Vignettes of Legal History

Second Series

by Julius J. Marke

with an introduction

by Bernard Schwartz

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To

Sylvia

and

Elisa

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PREFACE

Vignettes of Legal History was first published in 1965. It consists of repertorial presentations of historic trials and the roles played by some fascinating people and learned books in historic legal events. It seeks to tell an enriched version, but nonetheless an accurate one, of memorable events that influenced the growth of the law. To achieve that end I introduced anecdotal and biographical background by drawing upon contemporary newspapers and journal reports, memoirs, diaries, biographies, commentaries, court reports and trials. As I indicated in the Preface to that book, "my purpose was to recreate not only the drama, excitement and emotionalism of those passionate and extraordinary conflicts in Anglo-American legal history which brought forth our great landmark decisions, but also relate them to the bold and profound personalities who wrought them into epochmaking issues."

The favorable and at times, enthusiastic reception accorded to the *Vignettes,* encouraged me to continue my research and to write new ones. It is not without a sense of humility, that I have learned from my publisher that the entire edition has not only been sold, but there continues a persistent demand for it reflected in a considerable number of outstanding orders. As a result, that *Vignettes of Legal History* has been reprinted along with this *Vignettes of Legal History—Second Series.* Accordingly, it should be noted that *Vignettes of Legal History—Second Series,* is an entirely new book of different cases, events and incidents, and *not* a new edition.

As in the first work, I have attempted in the *Second Series* to stimulate the interest and understanding not only of lawyers and law students in the historic events I portray in the following pages; but also those concerned with seeking a clearer perception of how and why our

legal institutions have attained stature and acceptance today.

Andre Gide has noted that "Everything has been said already, but as no one listens, everything must be said again." How appropriate are his words as they apply to current confusion and misconceptions of the historical events that influenced the development of our legal institutions. The more I engaged in my research to retrieve contemporary clues and insights of value in understanding the human motivations and developments affecting certain historic events, the more I could appreciate Justice Holmes's wise comment in *New York Trust Co., v. Eisner,* 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic" to litigants and their lawyers.

Similarly, how enlightening are anecdotes and events in the lives of the great lawyers and judges of the past. They provide an illumination and an insight into the political and human forces that influenced great legal decisions which can rarely be perceived from the deadly dull and dusty official reports. How can we better understand the influence of Jeremiah Mason, for example, on Daniel Webster and subsequently on the outcome of the *Dartmouth College Case*? "If you asked me, who is the greatest lawyer I have known", replied Webster to that question, "I should say Chief Justice Marshall, but if you took me by the throat and pushed me to the wall, I should say Jeremiah Mason." Then again, in judging the value of primary source materials, there must be an awareness of their history and background. Take Lord Campbell, for example. Before he became Lord Chief Justice, he was a reporter of cases. "When I was a Nisi Prius reporter", he later revealed, "I had a drawer marked 'Bad Law' into which I threw all the cases which seemed improperly ruled. I was flattered to hear Sir James Mansfield, C. J., say: whoever reads Campbell's reports must be astonished to find how uniformly Lord Ellenborough's decisions were right. My rejected cases, which I kept as a curiosity, not maliciously, were all burnt in the great fire in the Temple when I was Attorney General."

I am indebted to the American Bar Association for allowing me to publish in this volume, a reedited and enlarged version of the *Case of the Outraged Lawyer* which first appeared in *Litigation* in 1976. I should also note that "*A Law Student's Guide to Mr. Justice Holmes*" first appeared in the Winter 1976 edition of the *University of Florida Law Review;* also that versions of *Gibbons v. Ogden* and *The Dartmouth College Case* first appeared in the *Law Center Bulletin of New York University.*

Once again, as in the Preface to *Vignettes of Legal History—First Series,* I would like to express my sense of indebtedness to Professor Bernard Schwartz, for his masterful and scholarly Introduction to the *Second Series,* which adds so significantly to the book.

Finally, I must acknowledge the assistance I received from my secretary, Carole Percaccia, in the deciphering and typing of my manuscript, and to my publisher, Fred B. Rothman, for his valuable editorial contribution in preparing it for publication.

"What a profession (law) is", exclaimed Mr. Justice Holmes. "No doubt everything is interesting when it is understood and seen in its connection with the rest of things. Every calling is great when greatly pursued. But what other (calling) gives such scope to realize the spontaneous energy of one's soul? In what other does one plunge so deep in the stream of life—to share its passions, its battles, its despairs, its triumphs, both of witness and actor?"

It is my hope that some of this enthusiasm and dedication will be revealed in the following pages—and in that spirit, as was said to Lord Mansfield, I give you "the Glorious Uncertainty of the Law."

Julius J. Marke

New York University
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October, 1977.

INTRODUCTION

All history, says Emerson, is subjective; in other words there is properly no history, only biography. This book, like its predecessor, not only gives life but also a new perspective to the Emerson aphorism. Professor Marke's vignettes are, in the main legal biographies—but of a type different from the traditional accounts of the lives of noted lawyers and judges. Most of the chapters that follow contain "case biographies"—accounts of the lives of important cases, ranging in significance from the great decisions of the Marshall Court, which laid the constitutional foundation of the new nation, to a famous Boston murder trial and the bizarre proceedings against Lord Ferrers in the House of Lords.

In his first *Vignettes,* Professor Marke dealt with two of the great decisions of the Marshall Court—*Marbury v. Madison* and *McCulloch v. Maryland.* The present volume discusses the three remaining landmark Marshall decisions—those in *Gibbons v. Ogden,* the *Dartmouth College Case,* and *Martin v. Hunter's Lessee. Marbury* and *McCulloch* laid down the foundation of our constitutional law, establishing both federal supremacy and the vital constitutional role of the Supreme Court. The decisions covered in this volume further expanded the constitutional base.

Gibbons v. Ogden gave Marshall the opportunity to deliver the classic opinion on the most important power vested in the nation: the commerce power. In *Gibbons,* says Beveridge's biography, Marshall welded the American people into a unit by the force of their commercial interests. It was the *Gibbons* opinion which first construed the Commerce Clause in a positive manner, enabling it to be fashioned into a formidable federal regulatory tool. As Marshall interpreted it, the clause became as broad as the

economic system—a conception comprehensive enough to include all the economic needs of the nation.

But the life of a case is not confined to the life of the law involved in it. And here is where the Marke treatment has special value: in these pages, we meet more than legal issues and doctrines. We meet the people who made these into great cases, with the eccentricities and foibles that made them as human as they were historically important. And what individuals they were in a case like *Gibbons*! From the giants of the Bar, such as Webster (no man was ever as great as Webster looked!) and Wirt to the protagonists themselves, particularly Thomas Gibbons, whose lawsuit became a personal vendetta which almost ruined both him and his opponent.

The *Dartmouth College* and *Martin* cases were perhaps not as important as *Gibbons,* but they too contributed to the Marshall Court's jurisprudential edifice. Of particular significance were their practical effects, strongly stressed in the Marke discussion. Before *Dartmouth College* there were still relatively few corporations in the country. Under the new-found confidence brought about by Marshall's opinion, they began to proliferate to such an extent that they soon transformed the face of the nation. The *Martin* case became the keystone in the arch of federal judicial power—itself essential to the operation of the constitutional system. If the federal courts play so prominent a role in enforcement of civil rights, it is largely because of the power upheld in *Martin v. Hunter's Lesee.*

In addition to its case biographies, this book also contains what may be termed the biography of a book (Blackstone's *Commentaries*), as well as biographies of legal institutions (the Inns of Court and Order of the Coif), and also more traditional short legal biographies of Lord Mansfield and Justice Holmes. It is altogether fitting that the book should end with its student guide to Holmes, for he, more than anyone else, may serve as the link between the Anglo-American legal tradition and the contemporary approach to law. Though Holmes was

eminently a legal historian, whose greatest work off the Bench was a historical analysis of common law doctrine, he became the leading prophet of the new legal era, whose writing sounded the clarion of twentieth-century jurisprudence.

Holmes's most famous statement was, of course, the sentence with which he began his *Common Law*: "The life of the law has not been logic; it has been experience." This is as true of literature as it is of law, as Francis Bacon long ago recognized. To paraphrase his famous essay, the experience of reading this book will help make the reader a "full [legal] man." This is a book not merely to be tasted or swallowed, but one to be "chewed and digested." It is an honor to have been asked to introduce the reader to such a work.

Bernard Schwartz

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October 1977

Gibbons v. Ogden

The Landmark Case that Unified the Nation

"Chancellor" Robert R. Livingston was a tall man "of distinguished bearing, whose powerful features, bold eyes, aggressive chin and acquisitive nose indicated a character of unyielding determination, persistence and hopefulness." The "Chancellor" was not only knowledgeable in the law, but he was also highly sophisticated in political matters and affairs of state. Not even he, however, suspected that, a routine request he would make for a respectable political favor would arouse such bitter passions, it would result almost in a state of war between New York and New Jersey, Connecticut and Ohio. Certainly, it was farthest from his thought, that it would be finally resolved in one of the greatest landmark cases in American constitutional law; one that according to Beveridge, "has done more to knit the American people into an indivisible Nation than any other force in our history, excepting only war." And yet—this is exactly what occurred when he wrote the following letter from Paris, on November 2, 1802, to his old friend, Thomas T. Tillotson, Secretary of State of New York:

"I fear that you will laugh at me when I mention it,

but I give you leave to do so provided you by no means neglect to execute (a commission) this session of the (New York) legislature thro' some of my friends—You know my passion for steamboats and the money I have expended on that object—I am not yet discouraged and tho all my old partners have given up the pursuit I have found a new one in Robert Fulton, a most ingenious young man, the inventor of the diving boat which made so much noise in Europe. We are now actually making experiments upon a large scale upon the Seine. Should they succeed, it would be mortifying to have any other competitor for the advantages—I have therefore drawn a short petition which I hope you will reduce to the form of law, copying the old one only substituting Fulton's name and mine and reducing the size of the boat to one of twenty tons instead of thirty."

Livingston was quite aware of the political situation in New York. He had been the first Chancellor of that state, serving from 1777 to February 1801. Although it is not generally known today, it was he who was called upon as Chancellor of New York to administer the oath of office to Washington at his first inauguration to the presidency on April 30, 1789, as the Supreme Court of the United States had not been officially constituted at the time. As an anti-Federalist, the Chancellor had been very much involved in national politics, as well as New York State politics. When Jefferson became President, he appointed Livingston United States Minister to France, where he successfully teamed up with James Monroe to negotiate the "Louisiana Purchase" in 1803.

Livingston, however, was much more than an aristocratic jurist, politician and statesman. He had another intriguing facet to his interests which had incited him to write his letter to Tillotson. For, Livingston was also a persevering and imaginative entrepreneur who had promoted the use of gypsium as a fertilizer and had long been concerned with the problem of steam navigation. He and his brother-in-law, John Stevens, had tried several times to construct a commercially operational steamboat, but without success.

Livingston had also been familiar with the steam boat experiments of John Fitch in the 1780's, and he was particularly sensitive to the fact that the Legislature of New York had on March 19, 1787 granted to Fitch for 14 years the sole and exclusive right of making, *using and navigating*, every kind of boat impelled by the force of fire or steam in all waters within the state. Fitch had developed some moderately successful steamboats, but his construction and operating costs had been so highly excessive, he had failed to obtain financial backing. Little had been heard from Fitch thereafter and as a result, when Livingston had claimed that he had devised a method of applying the steam engine to propel a boat, the Legislature on March 27, 1798, enacted a law declaring that inasmuch as Fitch was believed to be dead (actually he died on July 2, 1798), or had withdrawn from the state without having made any attempt to use his privilege, the grant to him was repealed and conferred instead on Livingston for a term of 20 years. One of the conditions of the grant, however, was that Livingston should build a boat in one year capable of making 4 miles an hour upstream on the Hudson River. Upon his failure to do so, the Legislature had then passed a new act on March 29, 1799, extending the former act for twenty years from 1799, on condition, however, this time, that Livingston conduct a successful experiment with a steam engine propelled boat before 1801. Livingston, however, failed again.

When Livingston met Robert Fulton in Paris, he recognized in Fulton's genius the solution to all his hopes and plans. Fulton, too, was a vigorous entrepreneur and he could forsee, as could Livingston, the tremendous potential of steamboat navigation in America. The United States had many important rivers, such as the Mississippi and the Hudson, on which produce and people could only float downstream. By means of steamboat navigation, however, they could be returned upstream, which would revolutionize river navigation in the states and bring great profits to the promoters. Livingston was so impressed with Fulton's experiments with a paddlewheel steamboat that he was convinced it would eventually

work. On October 10, 1802, he entered into a contract with Fulton to construct a steamboat capable of navigating the Hudson between New York and Albany. It was for this reason, therefore, that Livingston sent his letter to Tillotson on November 2, 1802. Now that he finally had the chance for success, he sought to protect his investment by once again obtaining the legislative grant of monopoly for his steamboats on the waterways of the state.

Tillotson accomplished his commission, and on April 5, 1803, an indulgent Legislature passed a new act declaring that the rights and privileges granted to Livingston by the Act of 1798, were extended to him and Robert Fulton for twenty years. Thus, Livingston and Fulton received a state monopoly which granted them the exclusive right "to construct, make, *use and navigate* all vessels moved by steam or fire in all creeks, rivers, bays or water whatsoever in the territory or jurisdiction of New York." Now, Livingston and Fulton could proceed with their plans.

After negotiating the "Louisiana Purchase" in 1803, Livingston retired from public life and returned to his house, "Claremont Manor," on the Hudson River. Fulton continued his experiments in England and on the continent and returned to the United States in 1806. During this period, however, he managed to arrange for the English firm of Boulton & Watt to ship to New York, an engine made to his steamboat specifications. This was an unusual achievement at the time, for England's mercantilism policy had forbidden such exportation in the past.

By the summer of 1807, "The Steamboat," as the partners called her, began to take shape in the boat yards at Paulus Hook. Their two-year time limit to produce the required steam driven boat to insure their grant having elapsed again, Livingston undeterred, once more persuaded the Legislature to extend it for another two years. Early in August, Helen Livingston wrote to her mother:

"Cousin Chancellor has a wonderful new boat, which is to make the voyage up the Hudson some day soon. It will hold a good many passengers, and he has, with his usual kindness, invited us to be of the party. *He says it will be something to remember all our lives.*"

And indeed it was! For on that eventful day, August 7, 1807, the *Steamboat*, whose name was later changed to *The Claremont* in honor of Livingston, with great clouds of smoke billowing behind it, made its historic voyage up the Hudson River to Albany and then back to New York, *in only five days*. The actual running time, at a speed of approximately five miles per hour, was 62 hours. The event staggered the public's imagination. Livingston and Fulton were exhilarated by their success. They became even more excited, when the state legislature, in acknowledgment of their extraordinary achievement, by act of April 11, 1808, extended their monopoly, in point of time, five years for every additional boat they put in service, until thirty years had elapsed. By the same act, all persons were forbidden to navigate the waters of the state, with any steamboat or vessel, without license from Livingston and Fulton, under penalty of forfeiture of the boat or vessel, "together with the engine, tackle and apparel thereof."

The legislature subsequently aggravated the situation even more drastically with reference to potential competitors of Livingston and Fulton by enacting a law on April 9, 1811, for enforcing the provisions of the 1808 Act. Any boat or vessel found navigating against the provisions of the 1808 Act, it decreed, would be deemed forfeited as of the day such vessel or boat navigated the waters of the state. Livingston and Fulton could immediately institute suit for such boat or vessel, as if they themselves had been dispossessed thereof by force. Once they brought such an action, the defendant could be prohibited by injunction from removing the boat or vessel out of the state or using it within the state! Hence, as a result of these extraordinary enactments, Livingston and Fulton were granted an exclusive monopoly to use steam navigation on all waters of the state of New York up to 1838.

No one had objected particularly to these laws when the steamboat was in an experimental stage, and it was highly doubtful whether it ever could be economically feasible. As a matter of fact, monopolies were liberally granted at the time by state legislatures, and they were accepted as matter of course. But once the steamboat was

recognized as an important source of navigational power, the situation changed rapidly.

Steamboat travel became highly popular and profitable. The partners soon had three boats in service between Albany and New York. The fare was seven dollars each way, with lesser rates for the eleven intermediate stops between the two cities. As the Monopoly grew more successful, it established routes between New York City and New Jersey and even arranged for similar service on the Mississippi River in Louisiana.

And then—difficulties and troubles arose! Livingston and Fulton did not have a patent on their invention! Soon there were other steamboats operated by enterprising businessmen plying the waters of Connecticut, Ohio and New Jersey, and even New York, in competition with the Monopoly. At first some were granted licenses by the Monopoly for which they were required to contribute a substantial part of their earnings. But this arrangement was obviously unpalatable, and before long, the Monopoly began to be harassed by retaliatory action. Why should tribute be paid to the Monopoly inquired the officials of neighboring states? New Jersey, Ohio and Connecticut passed laws of their own denying the use of their waters to any fire- or steam-driven boat operated by the Monopoly. The New Jersey law actually authorized the owner of any boat forfeited to the Monopoly under the New York laws, to capture and forfeit any steam boat lying in New Jersey waters belonging even in part to a citizen of New York. The feud became so intense and violent that armed conflict was anticipated momentarily. The possibility of a state of war between New York and other states began to worry responsible officials.

The charged atmosphere with reference to steamboat navigation became even more aggravated when citizens of New York decided to challenge the Monopoly's exclusive franchise by running their own "unlicensed" steamboats on the Hudson River. Thus, the Monopoly was attacked on two fronts—by those who claimed the right to enter the waters of New York from a point of origin in New Jersey

and by those who refused to pay the license fee merely to ply the waters of New York. The story is told that Cornelius Vanderbilt, who operated a steamship between New Jersey and New York, actually would hide on his boat when he entered New York waters and arranged for a young woman to steer his craft into New York harbor. In the event the ship would be captured, he conjectured the woman was more expendible than he!

James Van Ingen and his associates, were citizens of New York, who challenged the legality of the Monopoly's franchise. In open defiance, they steamed their unlicensed boats up and down the Hudson River. The Monopoly accepted the challenge by instituting an action in the New York Court of Chancery to enjoin them from doing so. Chancellor John Lansing refused to uphold the injunction on the theory that citizens of the state had a natural right to navigate its waters and, hence, the franchise laws were invalid. On appeal, however, to the Court of Errors, an entirely new dimension to the problem was raised. The Chancellor's decree was reversed in an able opinion of Chief Justice James Kent which questioned the jurisdiction of the National Government in matters involving intrastate commerce. (*Livingston v. Van Ingen*, 9 *Johnson* 507 (1812)). The Commerce Clause of the United States Constitution, (Article I. Section 8, Clause 3: "*The Congress shall have power . . . to regulate Commerce with foreign nations*, and among the several states. . .") suddenly became the focal point of the controversy! The onerous issue of State Rights versus Federal power was now raised and for the first time the Monopoly grant began to assume national significance.

Holding that the five New York State acts granting the monopoly to Livingston and Fulton were constitutional and valid, Kent insisted that State and Nation are "supreme within their respective constitutional spheres." Only when State and National laws "come directly in contact, as when they are aimed at each other" must the State laws "yield." But must the states anticipate laws of Congress to avoid such collision? He then proposed a "safe

rule of construction:" "If any given power was originally vested in this State, if it has not been exclusively ceded to Congress, or if the exercise of it has not been prohibited to the States, we may then go on in the exercise of the power until it comes practically in collision with the actual exercise of some Congressional power."

Kent, then continued, that the Constitutional grant to Congress to regulate commerce is not "in express terms, exclusive." It is only exclusive with reference to treaty-making and laying of import and export duties. On the other hand, the internal commerce of a state by land and by water remained entirely and "exclusively" within the scope of its original jurisdiction. As these acts, therefore, were not within any constitutional prohibition contained in Article I, sections 9 and 10, (powers prohibited to the states), and as there was no conflicting regulation of Congress on the subject of commerce with foreign nations, and among the several states, which in any way interfered with the grant, the acts were valid. Certainly, Kent, maintained, the proposition was inadmissible, that a state was divested of a capacity to grant an exclusive privilege of navigating a steamboat within its own waters, merely because Congress, in the plenary exercise of its power to regulate commerce *might* make some future regulations inconsistent with the exercise of that privilege. If Congress later decided to legislate in that area—then the Supreme Court of the United States should assume jurisdiction to determine to what extent Congress might do so lawfully.

Congress has no direct jurisdiction over the commerce or waters of New York. Actually, Kent held, Congress had *concurrent* jurisdiction over the state's navigable waters only to the extent that it "may be incidental and requisite to the due regulation of Commerce between the States, and with foreign nations."

And so the first round went to the Monopoly. But the fight had just begun! Ironically, as Warren points out, the steamboat monopoly "had been created by Republican legislators, owned by Republican statesmen and defended

largely by Republican lawyers—all connected with the faction in New York politics, headed by the Livingstons, Judge Ambrose Spenser and Cadwallader D. Colden." These were the very same Republicans who had so strongly denounced the "monster monopoly" of the Bank of the United States chartered by the Federal Government. The same Republicans who would later attack the Bank in *McCulloch v. Maryland* (1819)—And "who were now engaged in vigorously supporting an even more stringent monopoly chartered by a State."

The stakes were too high, however, to allow the Monopoly to remain unchallenged, and there were still other issues to be determined legally. In the *Livingston v. Van Ingen* case, for example, the defendants had not set up any patent right, or interposed as a defense any other right under any particular act of Congress. They had rested entirely on the objection that the statutes conferring the exclusive privilege were unconstitutional and void. There were still other theories to be tested and Colonel Aaron Ogden now stepped forward as the champion of the "oppressed." Ogden was not a man to be trifled with. A former Governor of the state of New Jersey, he was a political power with highly placed friends. It was he who had stirred up the New Jersey legislature to pass the law which authorized New Jersey citizens whose boats had been confiscated by the Monopoly to seize any New York boat in New Jersey waters. He was the proud owner of the *Seahorse,* a steamboat with four wheels. Fearing confiscation under the New York law of 1811, however, he operated it only in New Jersey waters where the State legislature had given him an "exclusive" license of his own! He had anxiously awaited the outcome of the *Van Ingen* case, and when it was finally decided adversely, he protested against the New York Monopoly in a Memorial to the New York Legislature. Ogden was heard by a special Committee appointed for the purpose, which acknowledged that there was much merit in his Memorial. It admitted that actually the boats constructed by Livingston and Fulton were "in substance the invention of John

Fitch." The monopoly had originally been granted to Fitch, and when he had allowed it to lapse, the right to use steamboats "became common to all citizens of the United States." It also cast doubts upon the validity of the statement Livingston made in 1798, to persuade the Legislature to grant him the monopoly. But, the Committee concluded, the Monopoly had to be upheld for "the honor of the State requires that its faith should be preserved."

Determined to destroy all opposition, the Monopoly aggressively demanded that the New Jersey Legislature repeal Ogden's exclusive franchise in New Jersey. At the hearing held in Trenton, New Jersey, Thomas Emmett, representing Fulton, warned the Legislature that if it were not repealed, "You will make your state an asylum for thieves and robbers." Ogden's party had lost control of the Legislature in the 1812 election, and his political influence was gone. Although the New Jersey legislature continued its war with the New York Monopoly, it did repeal Ogden's exclusive franchise. Ogden had no other alternative than to submit to the Monopoly. He could not beat them—he decided his best course was to join them. He paid for a license to run his steamship for ten years from Elizabeth town to New York, and he hoped for the best.

And now Thomas Gibbons entered into the controversy. Daring and enterprising, he too was a politician with influence. He established his own steamboat line which serviced several landings in New Jersey. He arranged with Ogden to exchange his passengers at Elizabethtown Point in New Jersey. Thus, his passengers could continue on to New York on Ogden's ferry boats, and Ogden's passengers from New York could continue on Gibbon's ships to points in New Jersey. They both used a common agent in New York City who sold tickets for continuous travel on the two lines.

Ever alert to their privileges, the Monopoly, through John Livingston, assignee of Chancellor Livingston's and Fulton's franchise, brought an action in the New York Court of Chancery to enjoin Ogden and Gibbons from

carrying passengers through to New Jersey points from New York. Ogden had been licensed only to operate between New York and Elizabethtown, and not to other points in New Jersey! Ogden feared the loss of his license. He answered that the waters, ports and harbors of Elizabethtown Point and other landings in New Jersey were within the jurisdiction of New Jersey and he denied that such navigation was in contravention of any law of New York. The Monopoly's grant was only as to waters exclusively within the state of New York, and it did not encompass any exclusive right to navigate steamboats between one port in New Jersey and another port in New Jersey. He also denied any agreement with Gibbons to circumvent the Monopoly's franchise.

Gibbons, after denying the Monopoly's right to "exclusively" navigate steamboats to the New Jersey shore introduced an entirely new element to the case—one that was eventually to receive national concern. He admitted that he ran his boat from one port in New Jersey to another port in New Jersey, but, he asserted, he had been duly issued a "coasting license" from the United States government, and his boat was enrolled and licensed under the laws of the United States, at Perth Amboy, New Jersey, to be employed in carrying on the coasting trade! Now the question was raised whether such a coasting license under the Act of Congress, passed on February 18, 1793, (1 Stat. 305) conferred any power to interfere with the grant.

But Kent, who had in 1814 become the Chancellor, in deciding the case (4 Johnson's Chancery Reports 50) merely pointed to a New York Statute in which the State asserted jurisdiction over "the whole of the river Hudson, southward of the northern boundary of the city of New York, and the whole of the bay between Staten Island and Long or Nassau Island." Gibbons was enjoined "from navigating the waters in the bay of New York, or Hudson river, between Staten Island and Powles Hook." Ogden, however, because of his licence from the Monopoly was permitted to continue his operations.

Ogden relaxed, but Gibbons was infuriated! He was

made of a different mettle than Ogden, and he decided to openly defy the Monopoly. He brazenly ran his ships between New York and New Jersey competing directly with Ogden. Now, Ogden had no other alternative but to seek to enjoin Gibbons in the New York Court of Chancery. Once again, Gibbons asserted his rights under the federal "coasting license," this time adding, however, that they entitled him to operate his ships "in the coasting trade between ports of the same state, *or of different states.*" No state law or grant, therefore, could exclude him from such traffic, "on any pretence to an exclusive right to navigate the waters of any particular state by steamboats."

This time Chancellor Kent met the challenge head-on and the historic landmark case of *Gibbons v. Ogden* began to wend its dramatic way to the Supreme Court of the United States.

Chancellor James Kent is listed by Dean Pound as one of the ten judges ranked first in American judicial history. His vigorous mind, extraordinary learning and notable decisions raised him to judicial eminence second only to Chief Justice Marshall. As a leading figure in American jurisprudence, he was so influential that his counsel was often sought, even by justices of the Supreme Court of the United States. Mr. Justice Story considered him the perfector, if not the father of American equity jurisprudence. Kent was a great believer in the rights of the individual. In his memoirs, he relates that when a temperance society urged him, as a token of his support, to pledge publicly not to drink intoxicating liquors, he exclaimed:

"Gentlemen, I refuse to sign any pledge. I never have been drunk, and, by the blessing of God, I never will get drunk, but I have a constitutional privilege to get drunk, and that privilege I will not sign away."

Like Chief Justice Marshall, Kent was a Federalist and a stout Conservative. When Kent, however, was confronted with the issue of state power versus national power over Commerce, the thinking of the two jurists stood out in stark contrast. For Kent, as a citizen of New

York, felt it necessary in *Ogden v. Gibbons* to assert the just prerogative of the state by upholding the exclusive legislative grant to Fulton and Livingston to navigate the waters of the State. Then again, as a staunch defender of individual rights, Kent by personal inclination tended to protect property rights legally granted by the legislature. Marshall, however, on appeal, sensitive to the prerogatives of the national government, stressed instead its power and supremacy. Both reflected superb intellectual ability in their reasoning, but interestingly, they maintained their positions without referring to authority or precedent. For, as Max Lerner so aptly notes, when the case of *Gibbons v. Ogden* came up for settlement, the Commerce Clause of the United States Constitution was "practically untrodden ground . . . what was chiefly available . . . was a body of verbal and business usage clustering around the word 'Commerce'."

In awarding and later perpetuating the injunction against Gibbons to restrain him from navigating the waters of New York State with his steamboats, Kent denied that the Act of Congress (February 18, 1793, ch. 8) providing for the enrolling and licensing of ships and vessels employed in the coasting trade and fisheries conferred "any right incompatible with an exclusive right in Livingston and Fulton to navigate steamboats upon the waters of the state." That right had been settled by the highest court in the State, the Court of Errors, in *Livingston v. Van Ingen*. Hence, being valid and constitutional, a federal coasting license could not have any effect in controlling the operation of the right granted by the state. "The Act of Congress", he maintained, "never meant to determine the right of property, or the use or enjoyment of it, under the laws of the states. . . . The license only gives the vessel an *American* character for purposes of revenue, while the right of the individual procuring the license to use the vessel, as against another individual setting up a distinct and exclusive right, remains precisely as it did before." Kent argued that the use and enjoyment of a specific chattel, no matter how title was derived, are

always subject to the laws and regulations of the state. Possession of a duly patented vessel or machine or medicine is enjoyed subject to the general laws of the land, such as laws establishing turnpike road and toll bridges. The only limitation on the authority of the state legislature to indulge in such power, he admitted, would occur when "the exercise of it would impede or defeat the operation of some lawful measure or be absolutely repugnant to some constitutional law of the Union."

Acknowledging that "when laws become repugnant to each other, the supreme or paramount law must and will prevail," still Kent insisted that situation was not involved in the case. If Congress had constitutionally granted duly licensed vessels the right to navigate the waters of the several states in conflict with state laws granting monopolies to certain operators, then such a law would "overcome and set aside the state grant." But Kent could see no "collision" between the Act of Congress and the New York State acts creating the steamboat monopoly. The federal coasting license merely entitled the licensee to the privileges of American vessels. The state grants of exclusive rights to navigate steamboats did not interfere with the rights of coasting licensees. The exclusive grants to Livingston and Fulton were passed subsequent to the federal law on coasting trade. No one had considered the federal law later to be a regulation of commerce among the states prohibitory of such a grant. Kent then held that "if the state laws were not absolutely null and void from the beginning, they require a greater power than a simple coasting license, to disarm them. . . . At least, the presence and clear manifestation of some constitutional law, or some judicial decision of the supreme power of the Union, acting upon those laws, in direct collision and conflict before we can retire from the support and defense of them."

Thus Kent advanced the controversial proposition that although Congress admittedly had the constitutional power to regulate commerce among the states by express and direct provisions so as to control and restrict the exercise of the state grant, still that power was not exclusive,

and without some explicit provision, the state jurisdiction over the subject remained in full force. Any doctrine to the contrary, as he later reiterated and stressed in his *Commentaries* "would carry the powers of the general government, by construction, to a greater extent over the residuary claims and assumed rights of the states" than any court decision had ever made theretofore.

Thomas Gibbons was no ordinary man. Not only was he one of the wealthiest merchants engaged in the shipping trade, but he was highly determined and even ruthless in the pursuit of principle. The Monopoly had to be challenged and broken, and Gibbons vowed he would leave no stone unturned to accomplish those ends. He authorized his attorneys to appeal to the Court of Errors and Appeals. Chancellor Kent's reasoning, however, reflecting as it did the judges own states' rights views, determined the issue, and his decree was unanimously affirmed by the highest court of the State. Undeterred, Gibson refused to acknowledge defeat. He still had one last recourse and he decided to persevere.

Daniel Webster's reputation as a great constitutional lawyer had been markedly enhanced by his triumphant victories in two landmark cases the Supreme Court had just decided—the *Dartmouth College Case* and *McCulloch v. Maryland.* Webster was being hailed as one of the foremost lawyers of the American Bar, second perhaps only to William Pinkney. Gibbons asked Webster to take the appeal to the Supreme Court, and Webster, recognizing the constitutional significance of the case, accepted. Gibbons, elated, then took a most unusual step. He arranged for his will to be redrawn, and he provided therein for a fund of $40,000 to be established to carry the costs of the litigation in the event of his death. Such dedication to a legal cause certainly deserves recognition. To no one's surprise, the Monopoly called on Pinkney to represent its cause and Pinkney accepted. Pinkney was the acknowledged leader of the Bar—without peer. He was a brilliant constitutional lawyer and a magnificent orator, and a veritable battle of giants was anticipated.

"Thus," as Beveridge so appropriately notes, "did the

famous case of *Gibbons vs. Ogden* reach the Supreme Court of the United States; thus was John Marshall given the opportunity to deliver the last but one of his greatest nation-making opinions. An opinion which, in the judgment of most lawyers and jurists, is second only to that in *McCulloch vs. Maryland* in ability and statesmanship. By some indeed, it is thought to be superior even to that state paper."

The "Steamboat Case", as it was popularily known, was scheduled for argument during the February, 1821 session of the Supreme Court. Instead, the case was dismissed for an embarrassing reason. The record failed to disclose a final decree in the New York Court of Errors, the court from which the appeal was being made. At last, the record was completed and the case was again docketed on January 10, 1822. But an unusual length of time elapsed before it was reached for argument, for the case was continued at each term of the Supreme Court until February, 1824. By then, much had happened to accentuate the importance of the outcome.

Unfortunately, William Pinkney had died in the interim, as well as John Wells, Gibbons' leading lawyer. The great debate between Webster and Pinkney which the bar had eagerly awaited thus never came to pass. But other outstanding lawyers were brought into the case and a memorable, decisive constitutional battle appeared in the making. Pinkney, however, was irreplaceable. His brilliance could not be matched. Reluctantly, the Monopoly retained Thomas Addis Emmet and Thomas J. Oakley. Although they were not in the same class as Pinkney, still Emmet and Oakley were outstanding lawyers. Emmet at 59, was the senior. A professional Republican, he was noted for his eloquence and forceful mentality. Oakley at 41 had formerly been Attorney General of New York. He too was an excellent lawyer with a reputation for a clear, logical mind. His contemporaries felt, however, that he lacked imagination.

Daniel Webster, William Wirt and David B. Ogden appeared for Gibbons. William Lowndes of South Carolina

regarded Webster as one without superior in the South and without equal in the North. By then Webster was acknowledged as the "most eminent practitioner" to appear before the Supreme Court. Wirt, however, had reservations about Webster's character. He was concerned that Webster was probably "as ambitious as Caesar." Inviting his brother-in-law to hear the argument the following week, however, he suggested it would be a "combat worth witnessing". He knew that Emmet's "whole soul is in the case, and he will stretch all his powers." On the other hand, Webster, because of his ambition, would "not be undone by any man, if it is within the compass of his power to avoid it." Wirt was 52 at the time, Attorney-General of the United States, esteemed and respected for his courtesy, grace, and leadership at the bar. A contemporary described his style as fluent and uninterrupted. "He delights and convinces, and no man hears him without understanding his arguments, a sure indication of a clear head and a logical mind. His arguments are constantly enlivened by classical allusions and flashes of wit. Many a dry cause, calculated to fatigue and weary, is thus rendered interesting to the spectator, as well as to the Court. . ." Ogden at 55 was one of the most successful practitioners of his day.

By the time the case was argued before the Court, it had become a national *cause celebre*. Transportation, as Beveridge clearly shows, "had become the most pressing and important of all economic and social problems confronting the nation, excepting only that of slavery; nor was any so unsettled, so confused." Exclusive privileges to navigate the internal waters of their states with steamboats had been granted by state legislatures in Louisiana, Georgia, Massachusetts, New Hampshire and Vermont. All this was done under the principle that the states were merely exercising their sovereign rights over their own waterways. Some states, in self-protection, began to take divisive retaliatory action. Ohio, for example, decreed in 1822 that unless the New York Monopoly allowed Ohio steamboat operators to navigate the New York side of Lake Erie, licensees of the Monopoly would not be per-

mitted to navigate and land passengers on the Ohio side. Every offense was made subject to a $100 fine.

Uppermost in the minds of responsible authorities was the need to improve communication and transportation among the states. Poor roads made overland transportation dangerous and highly uncertain. River navigation, on the other hand, was often stalled, delayed, or adversely affected by undredged and otherwise poorly maintained river beds. As the number of steam-drawn boats dramatically increased (as many as 79 steamboats were churning the Ohio River between Pittsburgh and St. Louis as early as 1820), the situation became even more aggravated. The question soon arose, who was responsible for these internal improvements? Did Congress have the power to spend national funds for this purpose? Congress passed a law in 1817 to improve "internal navigation" with bonus funds received from the National Bank, but President James Madison in vetoing it expressed his doubt whether "the power to regulate commerce among the several states (could) include a power to construct roads and canals, and to improve the navigation of water courses." Thereafter, in session after session of Congress, the matter was continually debated, up to and even during the arguments in *Gibbons v. Ogden*. What were the powers of the states and the national government over commerce?

Inevitably, the issue of national power over slavery became an integral part of the problem. For, as John Randolph argued in an impassioned speech before the House of Representatives, only three days before *Gibbons v. Ogden* was heard by the Supreme Court, if the doctrine of implied powers constitutionally empowered the national government to appropriate money to survey roads and canals, etc., ". . . to what will all this lead? To this, at last: If Congress possesses the power to do what is proposed by this bill, . . . they may emancipate every slave in the United States—and with stronger color of reason than they can exercise the power now contended for." Randolph warned the Congress not to arm the national government with such "colossal power" lest it aggravate the jealousy

and discord already existing "between different quarters of the country." Although he concluded with the reassuring words that his faction would "keep on the windward side of treason," still, he threatened by inuendo that "that unfortunate portion of this confederacy which is south of Mason and Dixon's line," would have no other alternative but to resort to armed rebellion.

At the same time, heated discussions were already taking place on the proposed tariff bill for 1824, and similar agitating debates were being anticipated.

This, then, was the stormy situation facing the nation when the case of *Gibbons v. Ogden* was called for argument before the Supreme Court on the eventful day of February 4, 1824. As Beveridge vividly notes, Marshall and his associates on the bench "were keenly alive to this situation". They were aware that more was at stake than the issues before the court—that "two groups of interests were in conflict. State Sovereignty standing for exclusive privileges as chief combatant, with Free Trade and Slavery as brothers in arms, confronted Nationalism, standing at that moment for the power of the nation over all commerce as the principal combatant, with a Protective Tariff and Emancipation as its most effective allies. Fate had interwoven subjects that neither logically nor naturally had any kinship."

Article I, Section 8, Clause 3 of the U. S. Constitution, which confers on Congress the power "to regulate commerce with foreign nations, and among the several states . . . "was drafted by the founding fathers in response to the weaknesses they felt to exist in the national government under the Articles of Confederation. They strongly believed that commerce among the states had to be regulated in such a way that no state could take advantage over another by reason of geography. James Madison, for example, likened the geographical situation of New Jersey located between the commercial cities of Philadelphia and New York "to a cask tapped at both ends."

To avoid this oppression and exploitation, which ran rampant under the Articles of Confederation, it was the

sense of the constitutional convention that a uniform system of commercial regulation was necessary. Thus the grant of power over interstate and foreign commerce was made to the Congress. But, the constitution merely confers such power. Nothing is stated about state power over commerce. What therefore was the effect of the simple existence of the clause itself with reference to the states? This was the novelty of the question addressed to the Supreme Court in *Gibbons v. Ogden,* for until then it had never been judicially resolved.

Five points revolved around this question. (1) Were the New York monopoly laws in conflict with patents issued by the United States, (2) Was the New York legislature regulating commerce when it enacted these laws? (3) Did New York have concurrent power with the federal government to regulate commerce in this way? (4) Was the power to regulate commerce exclusively lodged in the Congress? and (5) Were the New York laws in "collision" with any act of Congress? Above all, was the basic question; did the word "commerce", as set forth in the constitution include "navigation"?

Many years later, Webster told his friend Peter Harvey that shortly before the argument, he met with Wirt in Washington to decide the constitutional grounds on which they would base their case. Webster strongly urged that the crux of the problem was the constitutional grant to Congress to regulate commerce. He wanted to argue "the then novel question of the constitutional authority of Congress exclusively to regulate commerce in all its forms on all navigable waters of the United States . . . without any monopoly, restraint or interference created by States' legislation". Wirt insisted that to do so would be of little effect on the court. Instead, he suggested that the first and fifth questions were more in point. Webster then replied:

"Mr. Wirt, I will be as frank with you as you have been with me and say that I do not see the slightest ground to rest our case upon, in your view of it."

"Very well," said Wirt, "let us each argue it in his own way, and we will find out which, if either, is right."

According to Peter Harvey, Webster then continued:

"The case came on for argument. Mr. Wirt made one of his brilliant arguments before the court. I followed with my view. I can see the Chief Justice as he looked at the moment. Chief Justice Marshall always wrote with a quill. He never adopted the barbarous invention of steel pens. That abomination had not been introduced. And, always before counsel began to argue, the Chief Justice would nib his pen; and then, when everything was ready, pulling up the sleeves of his gown, he would nod to counsel who was to address him, as much to say, 'I am ready; now you may go on.'

"I think I never experienced more intellectual pleasure than in arguing that question to a man who could appreciate it and take it in; and he did take it in, as a baby takes in its mother's milk. . . The opinion of the court as rendered by the Chief Justice, was little else than a recital of my argument. The Chief Justice told me that he had little to do but to repeat that argument as it covered the whole ground. And what was a little curious, he never referred to the fact that Mr. Wirt had made an argument. . . That was very singular. It was an accident, I think. Mr. Wirt was a great lawyer and a great man. . ."

Actually, Webster was the first to address the court and Wirt closed after counsel for the Monopoly were heard. The courtroom was "excessively crowded" when Webster arose to make, as the correspondent for the *Washington Republican* wrote, "one of the most powerful arguments we ever remember to have heard". The case had aroused much excitement, and it was reflected in the tension that permeated the courtroom. Webster had worked long hours on his argument, carefully studying and analyzing the Congressional debates on internal improvements, as well as the arguments made in the case below, and he was exceedingly well prepared. Beveridge states that of all his legal arguments, "that in the steamboat case is incontestably supreme". Webster, himself, believed it was, along with the Dartmouth College argument, the most effective ever made by him before the

Supreme Court. Webster began in an unusual manner. He frankly admitted that the very respectable weight of authority in favor of the decision of the New York courts, as well as the deliberate re-enactment of the monopoly laws by the legislature of New York, made it necessary to "make out a clear case" and "unless we do so, we cannot hope for a reversal." But, Webster was leading from strength, for he was more than confident that his argument would be accepted by the court.

He spoke for two and one half hours developing his main point the Congress had exclusive power over commerce. He clearly showed what would happen to the country if each state could enact hostile and antagonistic laws with respect to transportation. Where would states' rights stop, he asked, if the New York monopoly laws were constitutional? Actually, they were repugnant to the constitution for "the power of Congress to regulate commerce is complete and entire, and, to a certain extent, necessarily exclusive." After historically developing the thesis that the Constitution was adopted essentially to "rescue" commerce "from the embarrassing and destructive consequences resulting from the legislation of so many different states, and to place it under the protection of a uniform law", he contended "that the people intended, in establishing the Constitution, to transfer from the several states to a general government, those high and important powers over commerce, which, in their exercise, were to maintain a uniform and general system. From the very nature of the case, these powers must be exclusive."

To allow each individual state to "assert a right of concurrent legislation" over commerce would result in "manifest encroachment and confusion." Webster finally concluded that not only did the "exclusive" power of Congress over commerce make the New York monopoly grant void "whether any case of actual collision has happened or not," but aside from that, the grant must be inoperative "when the rights claimed under it come in collision with other rights, enjoyed and secured under the laws of the United States, and such collision . . . clearly exists in this case."

Oakley followed Webster. He spoke for an hour on February 4, and continued for a whole day on February 5. That Oakley was far from intimidated by Webster's outstanding presentation is borne out by the report of a local newspaper correspondent who pronounced Oakley's speech as "probably without any exaggeration to be . . . one of the most ingenious and able arguments ever made in this court." Oakley argued that the states became free and independent and thus sovereign when they signed the Declaration of Independence. The Constitution of the United States is one of limited and expressly delegated powers which can only be exercised as granted, or in the cases enumerated. Therefore, the Constitution must be constructed strictly, as regards the powers expressly granted. As it is a grant of power in derogation of state sovereignty, every portion of power not granted must remain in the state legislature. An affirmative grant of power to the national government does not divest the states of a like power. All powers not expressly exclusive or clearly exclusive in their nature ought to be deemed concurrent. All implied powers are concurrent. Otherwise, the states would be deprived almost entirely of sovereignty, as these implied powers must inevitably be very numerous and must embrace a wide field of legislation.

"Commerce," Oakley maintained, "has a limited meaning in the context of constitutional construction. It pertains only to traffic, to buying and selling and interchange of commodities." As the power to regulate commerce is a concurrent power, the state may act in any manner in the exercise of that power, so long as its laws do not interfere with any right exercised under the Constitution of laws of the United States. Even if the federal coasting laws relied on by the appellant, gives a right, it is not the right of intercourse for any other purpose than for the coasting trade. The appellant did not establish that he was carrying on, or intended to carry on that trade. The state law, on the other hand, only regulates its own internal trade and right of navigation. This power to regulate is exclusively in the state, and hence, is

not in conflict with the Constitution or laws of the United States.

Emmet, who followed Oakley, spoke the whole day on February 6, and for two hours on February 7. Again, the courtroom attracted an unusual number of spectators. A Washington newspaper correspondent reported that the "courtroom was full to overflowing. So great was the assemblage of ladies that many of them were obliged to find seats within the bar. . . Several gentlemen of distinction were present, among whom the Secretary of State and many members of both Houses of Congress."

Although advanced in years, Emmet gave a brilliant and eloquent argument, which he sustained throughout the long period of time he spoke without pause. He argued that Congress did not have the power to regulate the internal commerce of the states, nor did it have the power to regulate the transportation of passengers, for this did not involve, according to the established meaning of these terms, trade and commerce. He then gave numerous examples of state acts regulating or prohibiting traffic in or importation of slaves, as well as of quarantine and pilotage laws. Chancellor Kent's "safe rule of construction and of action" as to when a state may exercise a power until in collision with a congressional power was quoted by Emmet with approval.

Wirt then closed the case with a "classic and eloquent" argument speaking two hours on February 7 and four hours on February 9. He argued the points he had discussed with Webster, and the impression he made in the courtroom was equal to the best of the other counsel. A correspondent described it as "a powerful and splendid effusion, grand, tender, picturesque, and pathetic." Wirt insisted that the monopoly laws of New York were unconstitutional and void because they were in conflict with powers esclusively vested in Congress, which powers Congress has fully exercised, by laws then in full force and that even if the powers were concurrent, the state legislation was in conflict with federal law.

Webster was confident of victory in the case. Writing

to his brother a week later he said: "Our Steam Boat Case is not yet decided, but it can go but one way." Warren notes, however, that his confidence was not entirely warranted for although Justices "Marshall and Washington were both strongly Federal in their political doctrines, Todd and Duval were equally firm in their State-Rights views; Johnson in a recent case on circuit in South Carolina had held that the federal power over interstate commerce was exclusive; Story's view, however, was more problematical, for, only four years before in *Houston v. Moore*, 5 Wheat 1, in 1820, he had expressed extremely broad views as to the concurrent powers of the States on many subjects."

The decision of the Supreme Court was anxiously awaited not only in New York, but also in many parts of the country where the influence of the Monopoly was felt. In the meantime, Marshall dislocated his shoulder while stepping from his carriage. This misfortune, caused him to be confined to his room and delayed the writing of his opinion. Interestingly, a newspaper reporter suggested, that because of the accident, "it is understood that Mr. Justice Story is now engaged in completing it." This has been questioned by Warren and others.

On March 2, 1824, Marshall delivered the opinion of the Court which, in the words of Beveridge, "has done more to knit the American people into an indivisible nation than any other one force in our history, excepting only war. In *Marbury vs. Madison,* he established the fundamental principle of liberty that a permanent written constitution controls a temporary Congress; in *Fletcher vs. Peck,* in *Sturges vs. Crowninshield,* and in the *Dartmouth College Case* he asserted the sanctity of good faith; in *McCulloch vs. Maryland* and *Cohens vs. Virginia* he made the government of the American people a living thing; but in *Gibbons vs. Ogden,* he welded that people into a unit by the force of their mutual interests."

Marshall was in his seventieth year when he read the opinion of the Court in *Gibbons v. Ogden* (9 Wheat 1 (1824).) Word had gone out that he would do so as soon as

he returned to the bench from his confinement and an eager group of lawyers and government officials awaited him. Marshall's voice was low and feeble and could barely be heard in the courtroom. Fearful of missing even one of his words, many of his listeners collected around the bench to hear him more lucidly. As the aged Chief Justice droned on, it became clear that a memorable and historic event was taking place—that finally and for the first time "the commerce clause" of the U. S. Constitution was being defined and given meaning.

In deciding against the Monopoly, Marshall began by acknowledging his respect for Chancellor Kent's opinion. "The State of New York maintains the constitutionality of these laws . . . It is supported by great names—by names which have all the titles to consideration that virtue, intelligence and office can bestow. No tribunal can approach the decision of this question, without feeling a just and real respect for that opinion which is sustained by such authority. . ."

Then Marshall immediately met head-on the challenge Oakley had thrown at the Court when he reminded the justices that by signing the Declaration of Independence the states became "free and independent" and "thus became sovereign". True, replied Marshall, but when the Constitution was adopted, "These allied sovereigns converted their league into a government" and "the whole charter in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which the change was effected."

Why should the powers expressly granted to the national government by the Constitution be construed strictly, asked Marshall? "Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly, the means of carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper for the purpose.' But this limitation on the means which may be used, is not extended to the

powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern that prescribes this rule. We do not, therefore, think ourselves justified in adopting it.

". . . If from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case."

In analyzing the Commerce Clause of the U. S. Constitution, Marshall, according to Webster, closely followed the reasoning in Webster's argument. Webster derived great satisfaction from this thought—especially for the reason, as he later stated, that the Chief Justice had preferred his points to those of Wirt's. But, it has been suggested by Justice Frankfurter and other constitutional authorities that Webster claimed too much.

First, Marshall carefully defined the terms "commerce," "regulate," and "among the several states." Oakley had maintained that "Commerce" should be limited to traffic, to buying and selling, or the interchange of commodities; navigation was not involved therein. But replied Marshall, "This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more, *it is intercourse.* It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Commerce has a broader meaning than traffic, Marshall insisted. "All America, understands, and has uniformly understood, the word 'commerce' to comprehend navigation."

Turning to the term "among the several states", Marshall explained that it meant "intermingled with". Therefore, "commerce among the states cannot stop at the external boundary line of each state, but may be intro-

duced into the interior. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. . ." This is so, continued Marshall because "the genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." In regulating commerce, therefore, either with foreign nations, or "among the several states", the power of Congress, "whatever it may be, must be exercised within the territorial jurisdiction of the several states."

On the power "to regulate", Marshall defined it as prescribing "the rule by which commerce is to be governed. This power, like others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case."

On the question whether the states had concurrent power with the federal government to regulate intrastate commerce, and therefore in the absence of congressional action, the states may regulate such commerce in accordance with state policy, Marshall distinguished between taxation and commerce. As to the former, concurrent power could be exercised—as to the latter, however, it was inapplicable. It is at this point in Marshall's opinion that Justice Frankfurter believes Marshall "was either unconsciously or calculatedly confused." If the states do not have concurrent power with the federal government over Commerce, then whether the federal coasting act of 1793 was in "collision" with the New York Monopoly laws or not, was irrelevant to the decision. Webster had argued that the states did not have this concurrent power. If Marshall had accepted this view, he had no need to determine whether

there was a "collision" between the federal and state laws. But Marshall, instead rested his decision on the finding that the federal and state laws were in conflict. Yet, on the other hand, he gave a learned dissertation to establish that the states did not have concurrent power over commerce—that the commerce power is exclusively federal.

Justice Johnson, in a separate opinion in which he concurred with Marshall, held to this view. Why did not Marshall base his decision on it? Instead Marshall found the federal coasting license act constitutional, and construed the act as granting free passage over the navigable waters of the U. S. and hence, any state legislation to the contrary was supplanted thereby. Frankfurter's answer to this intriguing question is that it is "more difficult to attribute to Marshall unconscious confusion of thought than it is to suspect that while, like Johnson, he saw in the Commerce Clause an opportunity to protect the national interest against state interferences even in the absence of congressional action, he was not yet prepared to transmute this possibility into constitutional doctrine."

Other authorities add to this view the thought that Marshall was "testing" the states' rights opinion and was concerned about making an issue of the doctrine of "exclusiveness", even though federal legislation was involved. Max Lerner notes that what has remained "is not Marshall's decision, but his essay; not his caution, but his daring. He had created the doctrine of the "dormant" power of the Commerce Clause; a doctrine that was to make of the clause a powerful engine for narrowing the scope of state power and increasing the scope of federal power." Beveridge believes that "Marshall, the statesman, rather than the judge appears in his opinion." For, while he strongly advocated nationalism, still he was "vague" with reference to concurrent state power over commerce.

Marshall's opinions usually were greeted most critically by the press and politicians. To his surprise, for the first and last time during his long tenure on the bench, his opinion in *Gibbons v. Ogden* was popularly acclaimed.

It was reprinted in newspapers and journals around the country and many laudatory editorials praised the decision and hailed the destruction of the Monopoly. John Randolph, however, characteristically complained that the opinion "contains a great deal that has no business there or indeed anywhere. . ."

Economically, the opinion was of utmost importance. The opening of the waterways leading to New York made it possible for New York City to become a great commercial center. Steamboat fares were drastically reduced. The $5.00 fare from New York to New Haven, for example, was lowered to $3.00. In one year, the number of steamboats plying from New York rose from 6 to 43. Interstate commerce improved immeasurably. The removal of potential state railroad monoplies was a marked factor in the successful development of railroad transportation but five years later.

A highly sensitive facet of the case, which Marshall intentionally passed over lightly, was whether the states had the authority to regulate commerce by enacting prohibitory laws on the importation of slaves. Marshall noted that the power of the states in this respect, as an exception to the exclusive power of Congress over commerce, could not, by statute, extend beyond 1808, and hence, by implication, such state laws enacted thereafter would be void. Of course, the slave autocracy considered this as a prelude to Congressional usurpation on this subject. Congressman Garnett threatened in Congress, that if this took place, the country would inevitably be thrown into revolution.

Politically, the decision insured the extension of federal authority at the expense of the states. Justice Frankfurter aptly notes that what "Marshall merely adumbrated in *Gibbons v. Ogden* became central to our whole constitutional scheme: the doctrine that the Commerce Clause, by is own force and without national legislation, puts it into the power of the court to place limits upon state authority . . . . that state authority must be subject to such limitations as the court finds it necessary

to apply for the protection of the national community . . . an audacious doctorine. . ."

Except for the "due process' clause of the 14th Amendment, the Commerce Clause has become one of the most important constitutional limitations imposed on the exercise of state power. In essence, it is established doctrine that, as held in *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942), "no form of state activity can constitutionally thwart the regulatory power granted by the Commerce Clause to Congress."

Marshall's opinion in *Gibbons v. Ogden,* as Charles Warren significantly recognizes, was the first great "trust" decision in American history. Certainly, we owe a debt of gratitude to Marshall for the role he played in the economic and political development of the country. It is not for naught that former Justice Arthur Goldberg credits Marshall's interpretation of the Commerce Clause for making the United States "a common market" and that Senator Henry Cabot Lodge called Marshall "a nation maker".

Joseph Story

Martin
v.
Hunter's Lessee

Establishing the Supremacy of the Federal Judiciary

On December 16, 1815, the Virginia Court of Appeals, in an extraordinary challenge to the Supreme Court of the United States, brought to a collision course, a festering constitutional issue of such fundamental magnitude, that it not only threatened the juristic framework of the nation, but the constitutional structure of the government itself.

Refusing to obey a mandate of the Supreme Court of the United States to compel the execution of a judgment rendered in a lower Virginia District court, the Court of Appeals defiantly asserted:

> "The Court is unanimously of opinion, that the Appellate power of the Supreme Court of the United States does not extend to this Court, under a sound construction of the Constitution of the United States; that so much of the 25th Section of the Act of Congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this Court, is not in pursuance of the Constitution of the United States. That the writ of error in this cause was improvidently allowed under the authority of that Act; that the proceedings thereon in

> the Supreme Court were *coram non judice,* in relation to this court and that obedience to its mandate be declined by the Court."

The manner in which this confrontation arose was as dramatic as the events which ensued. Politically and socially it stirred the country to such a fever pitch, that it has been described as "the first 'pass at arms' between the Virginia School of states-rights advocates and the Great Chief Justice." Yet, interestingly, although this crisis occurred during a period when Chief Justice Marshall invariably spoke for the Supreme Court, by a peculiar coincidence, he himself, was so intimately involved in the case, that it fell to Justice Story to resolve it in a celebrated opinion which became the "Keystone of the whole arch of Federal judicial power."

Article III, section 1 of the Constitution of the United States provides that "the judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain." Article III, section 2 adds that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States and treaties made . . . under their authority. . ." The Constitution, it should be noted in this context, does not specifically grant to the Supreme Court appellate power to review and revise judicial holdings of the state courts.

The framers of the Constitution did not question the desirability of a judicial power being invested in the new national government. The records of the Federal Convention of 1787 actually reveal that the provision for "one Supreme Court" was not even debated in Philadelphia at the time. The real bone of contention arose when an inferior federal court system was placed on the agenda. What resulted was in essence a compromise between the Randolph and Paterson plans—that an inferior federal court system should be established, when the Congress deemed it desirable.

Congress reacted expeditiously and the *Judiciary Act*

of 1789 (1 Stat. 73) established the jurisdiction of federal courts inferior to the United States Supreme Court. When the Judiciary bill was debated in the House of Representatives, there was a strong movement to limit the jurisdiction of inferior federal courts to admiralty matters only. Proponents of this view argued that the state courts had the power in the first instance to consider claims or defenses derived from federal law and the United States Constitution and they in turn could be corrected by the Supreme Court of the United States on appeal. Carrington of Virginia, for example, wrote to Madison: "Such an arrangement would save immense expense, would occasion little innovation in the ancient forms of judicial proceedings amongst the people, and would also, without difficulty, accommodate jury trials, in matters of fact, to the wishes of each state, as every one would retain its own usage." This argument was advanced not only by the Virginia representatives, but by influential New Englanders as well. Their opposition to granting the inferior federal courts jurisdiction over matters other than admiralty was so determined, that Fisher Ames noted in a letter to George Minot, "the question whether we shall have inferior federal tribunals . . . was very formidably contested" in the House of Representatives.

Those who favored granting the inferior federal courts more general jurisdiction argued that the wording of Article III implied that once inferior federal courts were established by Act of Congress, they automatically were vested with the jurisdictional powers specified therein for Article III reads that the judicial power of the United States "shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish" and that this power extends "to all cases in law and equity arising under the Constitution., the laws of the United States, and treaties made . . . under their authority. . ."

Finally, after establishing a system of federal inferior courts with general jurisdiction in federal cases, in what has been described as a "triumph of Federalist centraliza-

tion, and a cession of power to the Supreme Court of more consequence to the states than the 'necessary and proper' clause itself", Congress approved Section 25 of the Judiciary Act of 1789. The reason for its passage, was justified in Congressional debate as necessary to achieve uniformity in construction and applicability of the laws and equally important, to establish the supremacy of the central government in national affairs.

Section 25 provided:

> "A final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, or where is drawn in question of any clause of the Constitution, or a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, state or Commission may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."

When the constitutionality of Section 25 was attacked by the Virginia Court of Appeals, it had already been in force twenty-four years, and the Supreme Court had acted under it at least sixteen times, without opposition.

As an example of such state acquiesence, there was *Ware v. Hylton*, 3 Dallas 199 (1797) in which a 1777 Virginia law sequestering British property and providing that debts due to a British subject should be paid into the Loan Office of Virginia in discharge of these debts, was held to be constitutional by the Supreme Court, but as it was in conflict with the Treaty of Peace of 1783 entered into between the United States and Great Britain, the court had

nullified it. Then there was *Calder v. Bull,* 3 Dallas 386 (1798), in which the Supreme Court had upheld a state statute on the ground that it was not *ex post facto.* As late as 1810, in *Fletcher v. Peck,* 6 Cranch 386, involving a gigantic land fraud in which the Georgia Legislature had conspired as a party thereto, the Supreme Court, for the first time had unequivocably declared a state law unconstitutional. There, however, the case had originated in a federal court and was heard on appeal to the Supreme Court rather than by writ of error to a state court. Nevertheless, provision for that very situation had been made in section 25 of the Judiciary Act, which specifically allowed review of state court decisions by the Supreme Court over cases arising under the Constitution, treaties and laws of the United States. And only three years before the Virginia judges defied the Supreme Court, the Supreme Court in *New Jersey v. Wilson,* 7 Cranch 164 (1812) had actually invalidated a New Jersey statute on writ of error to the State Court.

So it came as a surprise that after this long period of silent submission by the states, the issue had suddenly flared up so decisively. It was also a most inopportune time for the federal government to meet such a challenge for the United States was not only then at war with Great Britain, but seriously divided internally as well by sectional interests. The anti-war sentiments bitterly voiced in New England had added new support for states' rights despite President Madison's earnest attempts to unite the country, and the celebrated case of *Martin v. Hunter's Lessee* erupting out of the Virginia Court appeared to be the catalyst which would certainly rock the country to its foundation.

The issue involved in *Martin v. Hunter's Lessee* reflected a strange and extended controversy in which the title to approximately 300,000 acress of rich timber and tobacco land—one of the most valuable tracts of land in the so-called "Northern Neck" of Virginia, was at stake. It had belonged to the then late Thomas, 6th Lord Fairfax of Cameron, who could trace the title directly back to an

original grant from the Crown; and who had died in England in 1781 devising it to his nephew and heir, Denny Fairfax.

Denny Fairfax was a British subject, and as an alien was subject to the Virginia laws at the time which did not allow aliens to inherit property in the state. To compound Denny Fairfax's problem, Virginia claimed title to these Fairfax lands pursuant to a Confiscatory act it had enacted in 1782 which declared void the Fairfax grant from the English crown. With the purpose of testing his title, Fairfax brought an action in ejectment against one Hite who had taken out a patent from the Commonwealth of Virginia for a section of the Fairfax lands.

When Fairfax lost in the local court, John Marshall represented him as his attorney in the appeal to the Court of Appeals of Virginia. Marshall did not believe it necessary to establish the title of Lord Fairfax, for "the long and quiet possession of himself and his predecessor; the acquiescence of the country; the several grants of the crown, together with the various acts of the assembly recognizing, and, in the most explicit terms, admitting his right, seemed to have fixed it on a foundation, not only not to be shaken, but even not to be attempted to be shaken.

John Marshall had more than a lawyer's interest in his client's case in this matter. He and his brother, James M. Marshall and his brother-in-law, Rawleigh Colston, had formed a syndicate, to purchase from Denny Fairfax a portion of valuable tobacco and timber land of the Fairfax tracts. James' father-in-law, the Revolutionary banker and daring land speculator, Robert Morris of Philadelphia, had urged them to purchase the land as an excellent investment for profit. James was married to Robert Morris's daughter Hester, who according to Beveridge, was at the time, "the second greatest heiress in America". The syndicate, however, lacked the funds to purchase the property and anticipated borrowing the money from Morris. Morris, unfortunately for the syndicate, was so heavily committed to his own land speculations at the time, that he lacked

the ready cash he had promised to loan to James. Anticipating the move of the seat of the National government from Philadelphia to Washington, he actually owned at the time as much as 7,234 lots in the city of Washington on the site of the proposed National Capital and surrounding areas. Eventually he had to arrange for James to travel to Europe and negotiate a loan with Dutch bankers to buy the Fairfax tracts. Obviously, if there were a cloud on Denny Fairfax's title to the lands, this would not only jeopardize the possibility of the loan, but also the feasibility of the investment. Under the circumstances, Marshall had to be absolutely sure of the legal situation in connection with the title.

To Marshall's disappointment, the court decided in favor of Hite and ordered Fairfax to convey legal title to the land he had acquired in his patent.

In 1789, Virginia granted to David Hunter, a land speculator, a part of the Fairfax Estate, including a portion of the land the Marshall syndicate had agreed to purchase from Denny Fairfax. In addition, the Commonwealth sold other portions to more than two hundred Virginian settlers. Because of the intricate types of interest in the Fairfax estates, as for example, the right to quit rents and revesionary rights in the lands in which Lord Fairfax had granted less than fee simple interests to others, the Marshall group decided to clear the title to the lands it had agreed to purchase by becoming a party to a test action upon "agreed" facts. The case "agreed" upon was brought by David Hunter. Although Hunter was actually the grantee, he was not exactly the real party in interest acting instead as a pawn to the Commonwealth of Virginia in its own efforts to clear the title to the Fairfax lands it had confiscated by legislation. Thereafter, the entire litigation on Hunter's behalf was carried on and financially supported by Virginia.

Fairfax's Devisee v. Hunter's Lessee arose in the Virginia State district Court, at Winchester, in 1791. In essence, the proceeding was in the form of a common law action of ejectment upon "a case agreed between the par-

ties". Professor Crosskey, an authoritative, but controversial commentator on the federal constitution, notes that under the Virginia practice of the time, such a proceeding served to settle points of law in dispute in land controversies similar to a modern action for a declaratory judgment. The practice was to agree upon facts, somewhat simplified, and on occasion, even fictitious, so that the legal issues could be submitted to the court. The "agreed case" then had the same standing and effect as a special verdict. The court had to accept the facts presented as "agreed", but by the same token, its judgment did not settle the title to land as an adjudication. Rather, it only established a judicial precedent.

Although *Fairfax's Devisee v. Hunter's Lessee* was instituted as an action in 1791, a "case" was not "agreed between the parties" until September 9, 1793. The parties to the case sought a decision which would clarify all the legal problems involved in the proposed sale of the Marshall group by Denny Fairfax of the tract of land in the Northern Neck which he had inherited from his uncle, Lord Fairfax. Three questions were presented to the Winchester Court. Aside from the underlying common law real property principles relevent to the action of ejectment in the "agreed" case, the court was faced with the effect of the confiscatory state statute and the two treaties entered into between the United States and Great Britain, known as the Treaty of Peace of 1783 and the then new Jay Treaty of 1794.

The *Fairfax* case was decided by the district court at Winchester on April 24, 1794 in favor of Denny Fairfax. The judges, St. George Tucker, who later became noted for his 1803 edition of Blackstone's Commentaries, which contained the first scholarly commentary on the American Constitution, and William Nelson, Jr., in holding for Fairfax, construed the common law of the State as well as the Virginia confiscatory statute and the Peace Treaties as governing in his favor. Thus, at least based on the common law of Virginia, title to the land was properly lodged in Denny Fairfax. Hunter appealed to the Virginia Court of Appeals.

Denny Fairfax died in 1800 while the suit was pending between 1796 and 1803. Philip Martin succeeded to his right as heir at law and devisee. In essence, Martin's case was based on the claim, that the title to the land had properly gone to Denny Fairfax under the will of his uncle, Lord Fairfax in 1781 and had never vested in the Commonwealth of Virginia prior to 1783, and hence was protected by the Treaty provisions which guaranteed the rights of British citizens owning land in the United States. Very much at stake in this controversy was whether Virginia had ever legally obtained title to the land by a proper proceeding under its own Confiscatory Act.

Later in 1795, Denny Fairfax instituted another action against Hunter in the United States Circuit Court at Richmond, to eject him from another plot of the Fairfax lands which Virginia had sold to Hunter, under its color of title. This too, was upon "a case agreed" and reflected the same issues as in the state case. The federal court, consisting of Justice James Iredell of the United States Supreme Court and the local district judge, Cyrus Griffin, decided all three issues in Fairfax's favor in June 1795.

There has been considerable speculation as to the reason for the second ejectment action. Grosskey surmises that the Marshall syndicate was eager to clear the title before purchasing the tracts from Fairfax under pressure from Robert Morris. Morris was too astute a businessman to loan money for the purchase when in essence all that was being purchased was "a cause of action" to determine title to the land. Then again, Denny Fairfax had imposed a time limit on the Marshall syndicate's right to purchase the tract, for he was of advanced age and properly impatient.

In 1795, therefore, we have two decisions, one by a state court and another by a federal court in Fairfax's favor. The federal case was appealable expeditiously to the Supreme Court of the United States. It was not too clear then whether the State Court case could eventually be reviewed by the Supreme Court, because under Section 25 of the Judiciary Law, the Supreme Court could obtain juris-

diction over it provided it involved a case construing a treaty clause of the United States and the decision had been against the title claimed by the defendant under such a Treaty. Then again, section 25 required that the case had to be brought to the Supreme Court from a state court, based on that court's error in construing the clause of the treaty in issue.

Because of the political intrigues surrounding the Fairfax lands at the time, (Beveridge notes that at the time "Virginia was governed by one of the most efficient party organizations (Jeffersonian) ever developed under free institutions, and at its head was Spencer Roane, President of the Court of Appeals"), Marshall probably believed he could receive a more expeditious and favorable ruling on all three issues in the case, from the Supreme Court, by instituting the second ejectment action in the United States Circuit Court. As expected by Marshall, Virginia through Hunter, appealed to the United States Supreme Court, from the Circuit Court decision.

The Supreme Court of the United States was then sitting in Philadelphia. When the case came on for argument, Hunter unexpectedly learned that Virginia had not appropriated funds to provide him with Counsel. He wrote to the Supreme Court from Richmond advising it of this development and requesting a continuance. John Marshall had travelled from Richmond to Philadelphia specifically to argue the appeal, but despite his vigorous opposition to the continuance, the Supreme Court decided to postpone it to the August term.

Robert Morris, wrote his son-in-law, James Marshall. "Your brother has been here. . . He could not get your case brought forward in the Supreme Court of the United States at which he was much dissatisfied, and I am much concerned thereat, fearing that real disadvantage will result to your concern thereby. . ." obviously alluding to the loan of funds sought by the Marshall syndicate to purchase the Fairfax traits.

At the August term, Hunter once again, petitioned by letter from Richmond, for more time. He "had employed

Mr. Campbell of Virginia, to argue the cause". Campbell, however, who was then a distinguished member of the Virginia Bar, had died that July. Hunter "being left without counsel, in consequence of this event, he prayed the cause might be continued till next term." Hunter did not advise the court, however, that he had also asked Alexander Hamilton, prior to Campbell's death to argue the appeal, but Hamilton had declined. It would appear that Hunter's main purpose was to delay the argument until the Virginia Legislature arranged for the payment of counsel fees.

At the August term, Attorney General Charles Lee and Jared Ingersoll appeared for Fairfax against the motion for a continuance. They argued that "From the nature of the cause, delay would be worse for the defendant in error (Fairfax) than a decision adverse to his claim." They then explained Fairfax's plight and the circumstances surrounding the appeal. The significant issue they urged the court to review was whether at common law, Denny Fairfax "being an alien could take and hold (Lord Fairfax's) lands by devise." They added that they would assert that Denny Fairfax's title was "completely protected by the Treaty of Peace." Justice Samuel Chase recalled a similar case in Maryland, he referred to as "Harrison's Case", in which the devise prevailed. He then suggested to the court that the case was "one of great moment and ought to be deliberately and finally settled." Unfortunately, both for Fairfax and the Marshall group, the court once again allowed a postponement.

John Marshall decided to try another tack. He was then a Federalist member of the Virginia House of Delegates. He arranged for a law to be enacted in 1796 compromising the claims of all concerned with the Fairfax estate which was confirmed by the statute. The time was propitious for such a settlement. The Federal Circuit Court's decision to support the Fairfax claim had aroused the anxiety and fear of the more than 200 persons who had paid approximately $100,000 to Virginia to purchase pacts of the Tract. Questionable too, was whether Virginia

had violated the 1783 Peace Treaty with Great Britain when its Legislature authorized the sale of these lands by statute. So, when the purchasers of these lands petitioned the legislature to adopt "some safe and speedy remedy" to protect them from the threatened loss of their lands, and being faced with the choice of proceeding with Supreme Court appeals of the state court case and the federal court case, or compromising the litigation, the Virginia House of Delegates opted for the compromise with the Marshall Syndicate. It therefore resolved that it would be advisable for the state to relinquish title to certain parts of the estate if the Marshall group would similarly relinquish title to other parts. None of the Fairfax land interests in the Northern Neck, however, was divested by the state.

John Marshall was not happy with the wording of the resolution. As a Federalist, he was wary of the Jeffersonians who were in control of the House of Delegates by two to one. He was concerned that the "Compromise" was not sufficient legally to resolve the controversy. Writing to the Speaker of the House on November 24, 1796, as "one of the purchasers of the lands of Mr. Fairfax and authorized to act for them all", he pledged that he would arrange for deeds of conveyance to the state of the lands sought by Virginia provided the state enacted a law "confirming, on the execution of such deeds, the title of those claiming under Mr. Fairfax the lands "sold to them by him.

On December 10, 1796, the Virginia Legislature passed an act reciting the Resolution, the Marshall Letter and confirming the compromise. Did an understanding result therefrom or a contract between the parties?

Despite the doubts as to the legal effect of this "compromise", Robert Morris managed to borrow funds from Dutch bankers to finance the purchase of a part of the lands negotiated by the Marshall syndicate and Denny Fairfax under their 1793 contract. The conveyance was made to James Marshall on August 30, 1797. Denny Martin died in 1800. The remainder of the lands thus contracted for was purchased from Philip Martin, the younger brother and devisee of Denny Fairfax on October 18, 1806.

Now that he had his "compromise", John Marshall arranged at the February 1797 term of the Supreme Court of the United States to have the appeal from his federal circuit case to be dismissed on motion.

Professor Crosskey, believes that the proceedings in this federal case are significant in that they suggest that John Marshall was of the opinion, even as early as 1796, that the Supreme Court had jurisdiction to review and decide state court cases involving state law as well as federal law.

Despite the "compromise", the state court case which arose from the Winchester court and there decided in favor of Fairfax was appealed by Hunter to the Virginia Court of Appeals at Richmond. It was not until the Federal Circuit Court had decided the other action in favor of Fairfax, however, that the state court appeal was argued in May, 1796. Of the four judges sitting then on the Virginia Court of Appeals, William Fleming, Peter Lyons, Paul Carrington and Spencer Roane, all but Roane would have decided for Fairfax if it had come to a decision. Instead the court took the case under advisement, then held it over for reargument, and eventually continued it without decision until April 23, 1810!

Why there was such a long lapse of time between the decision of the Winchester Court in 1794 and the decision of the Virginia Court of Appeals in 1810 is not too clear. David Hunter, however, managed during the period up to 1809, to preserve his appeal before the Virginia Appeal Court by moving appropriately to "revive" it from time to time. It has been suggested that Hunter delayed the appellate argument to allow for judges to be appointed to the court who would be more favorably disposed politically, as Jeffersonians, to rule in his favor. John Marshall, in the interim, had become Chief Justice of the United States on January 20, 1801, and obviously was disqualified to sit on the case if it was appealed to the Supreme Court of the United States. Also, by 1809, the Virginia Court of Appeals, then had only three judges, with Marshall's bitter, personal enemy, Spencer Roane, still sitting on that court.

Suddenly, the appeal was again "revived" on October

25, 1809, "with the consent of both parties" and was shortly thereafter argued again. After a re-argument, the case was finally decided by the Virginia Appeal Court on April 23, 1810. In addition to Spencer Roane, the other judges were St. George Tucker who had decided in favor of Fairfax below, and who promptly disqualified himself because he had become related by marriage to a member of Hunter's family and William Fleming. Fleming decided for Martin on the "agreed" case and Roane for Hunter, but then both judges agreed, to the consternation and protest of those who held title to the lands under Fairfax grants, to be governed in their decision by the "compromise" that had been entered into between the Marshall group and the Legislature in 1796. As that "compromise" had arranged for Denny Martin and those holding title under him to release certain lands and as the tracts of land in the case were part of these lands, Roane and Fleming read it into the "agreed" case although it had never been part of it, and then reversing the judgment of the lower court held in favor of Hunter. In doing so, the court denied the rights Fairfax claimed under the Treaty of Peace of 1783 and the Jay Treaty between the United States and Great Britain.

Roane, in his opinion, reflected his obvious hatred for John Marshall, referring to "appellees" when there was only one "appellee" suggesting to those familiar with the case that John Marshall, although Chief Justice of the United States was still intimately involved in the case, and then attacking his character when he discussed the items of the "compromise".: "I can never consent that the appellees, after having got the benefit thereof, should refuse to submit thereto, or pay the equivalent; the consequence of which would be, that the Commonwealth would have to remunerate the appellant for the land recovered from him! Such a course cannot be justified on the principles of justice and good faith; and, I confess, I was not a little surprised that the objection should have been raised in the case before us."

Thus, it was, by writ of error to the Virginia Court of

Appeals, that *Fairfax's Devisee v. Hunter's Lessee* was taken to the Supreme Court of the United States under section 25 of the Judiciary Law of 1789. The federal question presented was whether Virginia had denied a right assured to British holders of title to lands in the United States by the Peace Treaties between the United States and Great Britain. In response to the writ of error, the Virginia Court of Appeals certified the record without objection and the case was argued before the Supreme Court on February 27, 1812. Charles Lee and Walter Jones appeared for Fairfax and Robert G. Harper for Hunter, all highly distinguished members of the Supreme Court Bar at the time.

As was anticipated, Chief Justice Marshall disqualified himself because of his personal interest in the case. Thus, when the argument occurred before the Supreme Court, he was absent, along with Justice Washington who did not attend. Lee and Jones argued primarily that Virginia had never actually confiscated the Fairfax Estate even though authorized to do so by its Confiscatory Act. Therefore, when the Treaty of Peace of 1783 and the Jay Treaty of 1794 became effective and which preserved the title to lands owned by British subjects, Denny Fairfax still had title to the land.

It was not until more than year later, on March 15, 1813 that Justice Story delivered the opinion of the Court reversing the judgment of the Virginia Court of Appeals and sustaining the Fairfax title. When the decision was announced, Justice Todd absented himself and Justice Johnson dissented. Actually, the judgment of the Court was concurred in only by Justices Livingston and Duval—less than a majority of the Court as Justice Washington's vote is unknown.

Justice Joseph Story, a Jeffersonian Republican from Massachusetts, was the youngest man ever appointed to the Supreme Court of the U. S. Born on September 18, 1779 at Marblehead, Massachusetts, his father Elisha Story, a physician, achieved some personal renown for reasons other than he had had seven children by his first

wife and eleven by his second. Joseph Story was the oldest child of the second marriage.

By 1810, Story had become a leading member of the American Bar and a highly successful politician as well. When Justice Cushing died that year, four nominations for the seat were made by President Madison to the Senate. First Levi Lincoln was confirmed by the Senate, but he declined to serve because of his poor eyesight. Then Alexander Wolcott's nomination was rejected by the Senate. The third nominee, John Quincy Adams, was also confirmed, but he too declined. Story, the fourth nominee, finally was confirmed too and he accepted. He mounted the bench with Justice Gabriel Duvall of Maryland in November 1811.

Heavily documenting his findings, Story held that title to the Fairfax Estate was lodged in Denny Fairfax and confirmed by the peace treaties when Hunter brought his original suit. (7 Cranch 602) The Jay Treaty of 1794 protected the rights of aliens to property they possessed in the United States at the time of the Revolution. Furthermore, the Treaty banned forfeiture by reason of alienage. Story conceded Virginia could have acquired title in the lands if it had instituted an inquest of office for the purpose. But, it had failed to do so, and certainly could not accomplish it after the Treaty of Peace. Thus, the patent of Hunter was "issued improvidently and passed no title whatever." Were the Supreme Court to uphold Hunter's claim "(it) would be settling suits and controversies through the whole country." Story did not think it necessary to construe the 1783 Treaty of Peace. "We are well satisfied", he insisted, "that the Treaty of 1794 completely protects and confirms the title of Denny Fairfax." Story concluded that section 25 of the Judiciary Act was applicable and although the Virginia Court of Appeals had found differently, he ordered that court to enter judgment for Philip Martin in the case "as according to right and justice and the laws of the United States, and agreeable to said judgment and instruction of said Supreme Court ought to be had."

Thus, though only Livingston and Duval agreed with Story, less than a majority of the seven-member court, and Johnson in dissent found that Hunter's title should be upheld, the misfortunate mandamus was issued by the Supreme Court to the Virginia Court of Appeals. As with all Supreme Court writs, the mandamus was issued in the name of the Chief Justice.

The Supreme Court mandamus burst like a bombshell on the judges of the Virginia Court of Appeals. It was bad enough that it ran contrary to the popular sentiment that an alien, especially an Englishman, should not have the right to inherit property in the United States and that it completely overruled the common law and statutory law of Virginia. Even more aggravating was "Marshalls" "insulting" order to the highest court of the sovereign state of Virginia, which according to the Reporter of the case in 4 *Mumford's* 59 (1813), aroused "the sleeping spirit" of the old Dominion.

As heretofore noted, this was not the first time the Supreme Court had interfered with and reversed a decision of a State Court. Still the effect of Story's order really stirred the wrath of the people of Virginia, and especially Spencer Roane, the Chief Justice of the State and Marshall's ancient and enduring arch enemy, and the Republican Party leaders of the state.

The Virginia Court of Appeals indulged in the unusual practice of encouraging the members of the Virginia Bar to express their "sentiments" on the case. They allowed "Messers Nicholas and Hay" and other lawyers to argue on behalf of Hunter as amicus curiae, in addition to Hunter's own attorneys. The argument was allowed to continue before the court for six days, from March 31 to April 16, 1814. The judges also consulted with former President Jefferson and James Monroe. The Reporter of the case (4 Munford 3) noted that "The question whether this mandate should be obeyed excited all that attention from Bench and Bar, which its great importance truly wanted."

Four separate opinions were written by the judges of

the Virginia Court in opposition to the Supreme Court mandamus, which finally culminated in a unanimous decision rendered on December 16, 1815 to disobey it. It has been suggested that the delay in issuing the opinion of the court for more than a year was due to a desire on the part of the Virginia justices not to encourage the Federalist secessionist movement then being supported in New England as a result of the War of 1812. They recognized the lethal effect of their unanimous decision on national unity and as Republicans did not seek to destroy the government completely. Basically at stake was the constitutionality of section 25 of the Judiciary Law. If it were unconstitutional, as the Virginia judges agreed, then the Supreme Court's appellate jurisdiction over state court decisions failed, and the Virginia Court's decision would prevail. Otherwise, state sovereignty was in jeopardy.

When Section 25 of the Judiciary Act of 1789 was first considered in the courts, its effect caused confusion as to the prerogatives of the federal and state courts vis-a-vis each other. Warren, for example, notes a 1791 case in North Carolina in which a federal circuit judge improperly removed it by writ of certiorari to his federal jurisdiction, while it still was pending in the state court. Fisher Ames wrote to a friend that "the Supreme Judges of the State refused to obey, and the marshal did not execute his precept. . . The State Judges, knowing the angry state of the assembly, wrote a letter of complaint representing the affair. Whether the United States judges have kept within legal bounds is doubted. I should be sorry for an error of so serious a kind, and under such unlucky circumstances." The Legislature approved their conduct.

In 1798, Chief Justice McKeon of the Pennsylvania Supreme Court, who had been a signer of the Declaration of Independence, and then was a strong, partisan, Federalist, expounded on the position of the state courts in an opinion he wrote for a unanimous court in *Republican v. Cobbett,* 3 Dallas. 467. Cobbett had been placed under bond as a common libeller and when he continued his libellous publications, a criminal action was brought

against him in the state court. Cobbet, claiming that he was a British subject, moved to have the case transferred for trial to the U. S. Circuit Court. In denying Cobbett's petition, the "redoubtable" McKeon asserted that the Union was "as to some particular national, in others Federal, and in all the residue territorial, or in districts called States." When a collision occurs between the authority of the United States and a state "it cannot be remedied by the sole act of the Congress or the State; the people must be resorted to, for enlargement or modification. . . There is no common umpire but the people, who should adjust the affair by making amendments in the Constitutional way, or suffer from the defeat. . . There is no provision in the Constitution, that in such a case the judges of the Supreme Court of the United States shall control and be conclusive. Neither can the Congress by a law confer that power. There appears to be a defect in this matter. . ."

As we shall soon see, the *Cobbett* case was cited and quoted as practically mandatory authority by the Virginia judges in their opinions.

Judge Cabell spoke first for the Virginia Court of Appeals: "My investigations", he declared, "have terminated in the conviction that the Constitution of the United States does not warrant the power which the acts of Congress (section 25 of the Judiciary Act of 1789) purport to confer on the Federal Judiciary." He viewed the separation of powers under the Constitution as bestowing certain powers to the Federal government "which are specifically enumerated and principally affecting foreign relations and the general interest of the nation. These powers are limited not only by their special enumeration, but by the positive declaration that all powers not enumerated or not prohibited to the states, are reserved to the states, or to the people."

"This demarcation of power", he continued, "is not vain and ineffectual. The free exercise by the states of the powers reserved to them is as much sanctioned and guarded by the constitution of the United States as is the free exercise by the Federal government of the powers del-

egated to that government. If either be impaired, the system is deranged. The two governments . . . possessing each its portion of the divided sovereignty, although embracing the same territory, and operating on the same persons, and frequently on the same subjects, are nevertheless separate from, and independent of, each other. . . . The Constitution of the United States contemplates the independence of both governments, and regards the residuary sovereignty of the States as not less than inviolable than the delegated sovereignty of the United States. . ."

Then showing he had read Chief Justice McKeon carefully in the *Cobbett* case, he echoed: "It must have been forseen that controversies would sometimes arise as to the boundaries of the two jurisdictions. Yet the Constitution has provided no umpire, has erected no tribunal by which they shall be settled."

In fact, he explained, it was better for the system that such a tribunal had not been created since it "would produce evils greater than those of the occasional collisions which it could be designed to remedy."

Judge Cabell then turned to the nature of the State and Federal judiciaries. How could the Virginia Courts comply with the "command" from the Supreme Court? They had to act either as Federal or as State judges. Obviously, they were not Federal judges, having been neither commissioned as such nor having consented to being so. As state judges how could they be compelled "to enter up a judgment, not our own, but dictated and prescribed to us by another court?"

"Before one court can dictate to another the judgment it shall pronounce, it must bear to that other the relation of an appellate court. The term appellate, however, necessarily includes the idea of superiority. But one court cannot be correctly said to be superior to another, unless both of them belong to the same sovereignty. It would be a misapplication of terms to say that a court of Virginia is superior to a court of Maryland, or vice versa. The courts of the United States, therefore, belonging to one sovereignty, cannot be appellate courts in relation to the

state courts, which belong to a different sovereignty—and of course, their commands or instructions impose no obligation."

Finally, Cabell concluded that to admit this appellate jurisdiction would be to place the state courts "at the feet of the Federal courts and make them the unwilling instruments of their usurpation of states rights."

After Justice Brooke also refused to be obedient to the mandate, adding that the 25th section of the Judiciary Act was unconstitutional, Chief Justice Spencer Roane, who despite his political activities was still an eminent jurist, denounced the idea that State courts could be made arms of the Federal Judiciary simply because "in the course of their ordinary jurisdiction (they) incidentally acted upon the Constitution, laws, or treaties of the United States." This, he ridiculed could result in "a circumstance which would equally make the Supreme Court of Calcutta a part of the judicial system of the United States when enforcing the laws of this country and that."

Even though Story had written the Supreme Court opinion, Roane could not help snidely noting that the Marshall Court, and of course, Chief Justice Marshall particularly, had "gained ground by piece-meal" and that its assertions of power were "at war with the idea of limited and specified powers in the general government." Thus, despite the fact the Supreme Court had assumed jurisdiction from 1789 to 1813 of writs of error to state courts in 16 cases, still he asserted, the issue had never been argued with the importance it deserved, as was finally being done in the case on appeal before the Virginia Court.

Roane, too, had studied McKeon's opinion in the *Cobbett* case thoroughly. Quoting at length from it, and noting it as an example of a state court refusing to permit the transfer of a case before it to the federal courts, he concluded:

"Upon the whole, I am of the opinion that the Constitution confers no power upon the Supreme Court of the United States to meddle with the judgments of this court in the case before us . . . and that this court is both at lib-

erty and is bound, to follow its own convictions on the subject, anything in the decisions, or supposed decisions of any other court, to the contrary notwithstanding."

Reviewing Roane's opinion a century later, William E. Dodd aptly noted that it was really "a political manifesto designed to advance the cause of state sovereignty and to arouse hostility towards Marshall, who seemed still to dominate the Court. Public discussion was at once aroused and the local court was fully sustained in its refusal to honor the mandamus. John Taylor of Carolina took up his pen once more on behalf of state rights and the *Enquirer* thundered against the great Chief Justice who was again proving false to the 'Ancient Dominion'."

Jefferson approved of Roane's opinion and so advised him. Roane responded: "I am much flattered and gratified by the result of your letter; flattered by the very civil manner in which you are pleased to speak of my humble labors; and gratified to find that I have not erred, in the great principles at least, on which the question seems to turn."

Then, with Judge Fleming also concurring, the Virginia Court of Appeals unanimously threw the gauntlet before the Supreme Court of the United States and refused to obey its mandate because "the appellate power of the Supreme Court of the United States does not extend to this court. . ." and "so much of the 25th section of the act of Congress "which provides for such jurisdiction was unconstitutional. The court at Winchester was therefore instructed to execute the judgment of the Court of Appeals.

James Marshall, as executor of the Denny Fairfax will, immediately arranged for Philip Martin to petition the Supreme Court of the United States for a writ of error. Thus, the case came before the Supreme Court for review again, but this time as *Martin v. Hunter's Lessee.*

Once again eminent counsel argued the appeal before the Supreme Court. This time, as an indication of how important Virginia considered the case, the Commonwealth retained leading southern lawyers, St. George Tucker of Virginia, and the leader of the Massachusetts Bar, Samuel

Dexter, to appear for Hunter. Tucker, of course, was noted for his lectures on law at the College of William and Mary, which had been published in his 1803 edition of Blackstone's Commentaries, as well as his general prowess as an appellate advocate. Dexter was at the height of his career as an appellate lawyer and much sought after. Unfortunately, he died in 1816, shortly after his argument in the case. Story was very much impressed by Dexter's legal ability and style. Although Story believed that Dexter had "a disinclination to black-lettered law, which he sometimes censured as the scholastic refinements of monkish ages", writing to his wife, Story described Dexter as "calm, collected and forcible, appealing to the judgment. . . You hear Dexter without effort; he is always distinct and perspicuous, and allows you an opportunity to weigh as you proceed. . ." Walter Jones, appeared for Martin again. It has been noted that close to one fourth of all cases appearing in the volumes of the reports of U. S. cases in Wheaton and Peters, from 1815 to 1830 were argued by Walter Jones, along with Frances Scott Key, John Law and Thomas Swann.

When *Martin v. Hunter's Lessee* came on for argument, there was a sense of drama and excitement felt throughout the Court. At the time, as we learn from a contemporary account by George Ticknor, the Court was in temporary quarters. "I passed the whole of this morning in the Supreme Court," he wrote in February 1815. "The room in which the Judges are compelled temporarily to sit is, like everything else that is official, uncomfortable and unfit for the purposes for which it is used. They sat—I thought inconveniently—at the upper end; but, as they were all dressed in flowing black robes and were fully powdered, they looked dignified . . . Judge Washington is a little, sharp-faced gentleman, with only one eye, and a profusion of snuff distributed over his face; and Judge Duval very like the late vice-president. The court was opened at half past eleven, and Judge Livingston and Judge Marshall read written opinions on two causes."

After a few moments' pause, the court proceeded to

hear the arguments of Dexter, Tucker and Jones. Marshall once again disqualified himself, and did not sit in the case.

Jones, for Martin, the plaintiff in error, came to the point of the case forthwith. There were two questions for the Court to consider. First, whether the Supreme Court has jurisdiction and second, whether it had been rightly exercised in the case. He argued that contemporaneous construction and the uniform practice since the Constitution was adopted, confirms the jurisdiction of the Court. The government is not a mere confederacy, like the Grecian leagues or the Germanic constitution. In its legislative, executive and judicial authorities, it is a national government, to every purpose, within the scope of the objects enumerated in the Constitution. Its judicial authority is analogous to its legislative. It alone has the power of making treaties; those treaties are declared to be the law of the land; and the judiciary of the United States is exclusively vested with the power of construing them. The second section of Article Three, of the Constitution provides, that the judicial power "shall extend to all cases in law or equity, arising under this Constitution, the laws of the United States and the Treaties made, or which shall be made under their authority." All cases, is an emphatic expression and shows that it cannot extend to a limited number of cases. The state legislatures cannot make treaties. Why should the state judicatures be offended at being excluded from the authority of expounding them?

Under the Constitution, he continued, Congress *must* establish a Supreme Court. They *may* establish inferior courts. The Supreme Court must have the appellate jurisdiction vested in them by the Constitution and Congress cannot deny them of it, by failing to establish inferior tribunals. Those tribunals may not exist; and therefore, the appellate jurisdiction must extend beyond appeals from the courts of the United States alone. The State Courts are to adjudicate under the Supreme law of the land, as a rule binding upon them.

As to the remedy of the plaintiff in error, the

Supreme Court is not limited to a mandate, as the only remedy. It could also award a writ of execution upon its own judgment and the cause was now before the Court, so as to enable it to do this.

Then Tucker arose on Hunter's behalf. Although questioning the constitutionality of Section 25 of the Judiciary Act, he conceded that the Supreme Court undoubtedly, has all the incidental powers necessary to carry into effect, the powers expressly given by the Constitution. But, he insisted, this cannot extend to the exercise of any power inconsistent with the whole genius acting on the citizens of the United States at large, and not on the state authorities. The state courts are bound by treaties, as part of the Supreme law of the land, and they must construe them in order to obey them. The only constitutional method of giving any greater effect to the supremacy of treaties, would have been by enabling the parties claiming under them to sue in the national courts.

Arguing against the constitutionality of section 25 of the Judiciary Act, Dexter agreed that the judicial powers granted by the Constitution are exclusive but denied that any appellate jurisdiction is given by the Constitution. It is neither express nor implied, nor is there any necessity for it.

Jones, in reply, asserted that the states are deprived by the Constitution, of the character of perfect states, as defined by jurists. They are still sovereign *sub modo,* but the national government pervades all their territory, and acts upon all their citizens. The state judicatures are essentially incompetent to pronounce what is law; not in the limited sphere of their territorial jurisdiction, but throughout the Union and the world.

Story delivered the opinion of the Court, which in Beveridge's words, "was one of the longest and ablest he ever wrote". When Story rendered his opinion in the Supreme Court 1813 case, *Fairfax's Devisee v. Hunter's Lessee,* only a question of title to land was at issue. Now the very existence of the federal system of government was at stake. This was the first opportunity Story had to express his

thoughts on a question of constitutional law of such magnitude and importance.

The accession of Justices Story and Duval to the Supreme Court in November 1811, had given that court for the first time a majority of Republican justices. The Republicans were strict constitutional constructionists who believed in limiting the powers of the Federal government to the express and exact terms of the Constitution. The Federalists, on the other hand, advocated a more liberal interpretation favoring the powers of the national government. In essence, the positions taken reflected the classic struggle of state sovereignty versus federal sovereignty. Story considered himself a Republican in politics. Writing to a friend in 1815, shortly after the War of 1812 had ended, he exulted: "Never was there a more glorious opportunity for the Republican Party to place themselves permanently in power. They have now a golden opportunity. I pray God it may not be thrown away."

As a fellow Republican, Story was expected by the Virginia Jeffersonians, to agree with their position. They were doomed to disappointment! For Story saw the constitution in terms of a national, organic law rather than a federal compact. The constitution was established not by the states in their sovereign capacities, but rather by the people of the United States. He also recognized the importance and "necessity of uniformity of decisions throughout the whole United States, upon all subjects within the preview of the Constitution". Coining one of his rare epigrams, Story emphasized *"It is the case, then, and not the court that gives the jurisdiction."*

Story's opinion has been ranked as second only to *Marbury v. Madison* among the most important decisions of the Marshall era on federal judicial supremacy. It differs from most of his other opinions in that it is a closely-reasoned argument without the citation of authority. In fact, it reflects so many of the characteristics and style of Marshall's written opinions, especially in logic and compactness, that it has been suggested, that if Marshall had

not written it for him, it at least reflects the influence of Marshall on Story's thinking. Henry Adams believed that "much of the opinion bore the stamp of Marshall's mind; much showed the turn of Story's intelligence. . . The same principle lay beneath the whole."

Story's biographer, Gerald Dunne, has concluded: "manifestly, Marshall and Story must have discussed, if not the case, at least its principles time and time again. Against this background, the epigram, as well as the other swathes of Marshallian prose, merely attests that Story had an extraordinary recall for what he heard, as well as what he read and therefore reproduced verbatim consciously or otherwise, Marshall's remarks on the subject." Beveridge believes, that it was generally supposed that Marshall "practically dictated" Story's opinion.

Story's opinion has been described by Charles Haines as "a political manifesto under the cloak of constitutional interpretation, the purposes of which was to advance the cause of Federalism and nationalism . . . at bottom the issue was one of politics and expediency rather than law. Was it preferable to have a federation or a confederation of states?" Story could just as easily as not have sustained the judgment of the Virginia Court of Appeals dependent on what assumption he accepted on the constitutional design. Instead he found to the contrary.

Story began his opinion with an acknowledgement of the "great importance and delicacy" of the questions involved in the case. "Perhaps it is not too much to affirm", he continued, "that upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the Constitution itself. . ." (1 Wheaton 317)

After praising the learning and ability of the judges of the Virginia Court of Appeals, he reviewed "some preliminary considerations". He emphasized that the Constitution of the United States 'was ordained and established, not by the States, in their sovereign capacities, but, as the preamble of the Constitution declares, by "the people of the United States". The people of the United

States were competent to invest the general government with powers deemed proper and necessary, to limit them or to expand them at their "good pleasure" and to give them "a paramount and supreme authority". Certainly, the people could limit the exercise of powers of the states which were "incompatible with the objects of the general compact and to "make the powers of the state governments, in given cases, subordinate to those of the Nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. . ."

Continuing in the same vein, he reiterated: "The Constitution was not, therefore, necessarily carved out of the existing state sovereignties, nor a surrender of powers already existing in state institutions."

What then, under the Constitution, were the powers of the federal government in its relationship with the states?

"The government then, of the United States:, he replied, "can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument . . . is to have a reasonable construction according to the import of its terms, and where a power is expressly given in general terms, it is not to be restrained to particular cases unless that construction grows out of the context expressly, or by necessary implication. The words are to be taken in the natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

Turning to the opinions rendered by the judges of the Virginia Court of Appeals, on federal appellate authority, Story responded:

"It has been argued that such an appellate jurisdiction (of the United States) over state courts is inconsistent with the genius of our governments, and the spirit of the Constitution, that the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the

sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent."

It was plain to Story that "the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might, but would arise in the state courts in the exercise of their ordinary jurisdiction." With this view, the 6th article of the Constitution declares the supremacy of the laws of the United States and that the judges in the states would be bound thereby. Thus, even though they were state appointed judges, they would be compelled under the Constitution to enforce the laws of the United States.

Story illustrated how federal constitutional cases could arise in state courts. "Suppose an indictment for a crime in a state court, and the defendant should allege in his defense that the crime was created by an *ex post facto* act of the State, must not the state court, in the exercise of a jurisdiction which has already rightfully attacked, have a right to pronounce on the validity and sufficiency of the defense? . . . It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the Constitution, the laws and treaties of the United States, Yet to all these cases, the judicial power, by the very terms of the Constitution is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attacked in the state courts . . . it must therefore extend by appellate jurisdiction or not at all."

Story continued that the Constitution not only affects all United States citizens, it also limits the powers of the states despite their sovereign rights.

The Virginia judges were mistaken when they argued that the "Constitution was not designed to operate upon states, in their corporate capacities". The Constitution, Story noted, "is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the

first article contains a long list of disabilities and prohibitions imposed upon the states . . . when, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of Congress, and in every case are under the Constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power."

"The appellate power", he added with magisterial force, "is not limited by the terms of the third article to any particular courts. The words are, 'the judicial power' (which includes appellate power) 'shall extend to all cases', etc. 'and in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction. . .

"It is the case, then, and not the court", he stressed epigrammatically, *"that gives the jurisdiction,"* (Stylistically, this phrase is so characteristic of Marshall's opinion writing style, it has caused reason to suspect that the influence of Marshall on Story's opinion was highly significant.)

Continuing from this premise, Story declared: "If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent then, upon those who assist such a qualification to show its existence by necessary implication. . . If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution be exclusive

of State tribunals. How otherwise could the jurisdiction extend to all cases arising under the Constitution, laws and treaties of the United States, or to all cases of admiralty and maritime jurisdiction?"

"If some of these cases might be entertained by State Tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some cases. If State Tribunals might exercise concurrent jurisdiction over all or some of the other class of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive, and this not only, when the *casus faederis* should arise directly, but when it should arise incidentally in cases pending in State Courts."

Justice William Johnson, in his concurring opinion disagreed with this reasoning. He recognized the paramount importance of the issue and quoted with approval Patrick Henry's exclamation, "I rejoice that Virginia has resisted." His main purpose was to defend the dignity of Virginia and avoid its humiliation. He therefore specifically referred to the fact that the Supreme Court "disavows all intention to decide on the right to issue compulsory process of the state courts; thus leaving us, in my opinion, where the Constitution and laws place us—supreme over persons and cases, as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals."

Johnson did have reservations about the unanimous decision of the Virginia Court of Appeals that the appellate power of the United States did not extend to it. He questioned critically, "Are then, the judgments of this (Supreme) Court to be reviewed in every court of our Union?" The authority of the Supreme Court of the United States, he reminded the Virginia judges, rests upon "a superior claim upon the comity of the State Tribunals" and not upon the supremacy over state tribunals.

Story, argued in support of the constitutionality of the appellate power of the Supreme Court over state court decisions that it was necessary under Articles III (Judiciary Clause) and Articles VI (Supremacy Clause) of the Constitution and in recognition of the urgency and compelling requirement of uniform interpretation of the laws of the nation. Stressing the importance and "necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution", Story cautioned that "Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different states and might, perhaps never have precisely the same construction, obligations or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which framed the Constitution."

Story did emphasize a point on the creation of inferior federal courts by the Congress, which is not acceptable today. He said that Article III of the Constitution unconditionally *ordered* Congress to vest the judicial power of the United States in inferior courts, as well as the Supreme Court. Congress had no discretion in the matter. "The Congress are bound to create some inferior courts." Furthermore, "all that jurisdiction which under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance" had to be vested in these inferior courts.

As the judicial power defined in Article III reads that it *shall* be vested in the Supreme Court and such inferior courts as Congress may ordain and establish, Story argued that such language "is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its

duty, have refused to carry it into operation." Hence, Congress lacked the power to deny the creation of these courts, nor could Congress by legislation limit their jurisdiction as set forth in the Constitution, on the theory that they were ordained, as the Supreme Court, by the Constitutional mandate.

It should be noted in this context, that whether the federal courts derive their jurisdiction from Congress or from the Constitution, was not in issue in *Martin v. Hunter's Lessee*. Hence, Story in expressing his views did so by way of *obiter dictum*. Justice Johnson, in his concurring opinion, attacked Story's dictum as unfounded. Johnson's position has been supported by many constitutional authorities, including the Supreme Court itself, and it is well established now that Congress in its discretion may limit the jurisdiction of the inferior federal courts as it deems necessary.

The judicial history of the inferior federal courts bear this out. Over the years, Congress has added to and limited their jurisdiction. In the early years their jurisdiction was primarily concerned with admiralty matters or based on diversity of citizenship of the litigants. As a result, as Professor Bernard Schwartz has aptly noted, "original jurisdiction in cases arising under the Constitution, laws, and treaties of the United States was exercised by the state courts, subject to limited review by the Supreme Court under section 25 of the Judiciary Act. It was not until 1875, indeed, that the Congress finally passed a law which authorized all cases arising under federal law to be brought in the federal courts, thus giving them concurrent jurisdiction with the state courts over cases involving federal questions." (Schwartz, Bernard. The Powers of Government, 354 (1963).

Eventually, Story concluded: "On the whole, the courts are of the opinion, that the appellate power of the United States does extend to the cases pending in the state courts; and that the 25th section of the Judiciary Act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the

letter and spirit of the Constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one."

Having disposed of the appellate jurisdictional issue in the case, Story found that "the question now litigated is not upon the construction of the treaty, but upon the constitutionality of jurisdiction." For the benefit of the public, however, Story "re-examined" the entire record of the case as it was first considered by the Supreme Court in 1813, and reaffirmed its correctness. As the Marshall "compromise" had not been spread on the record, the Supreme Court could not take "judicial cognizance" of it. Without considering the Treaty of Peace of 1783, Fairfax's title, Story held, "was, at all events, perfect under the Treaty of 1794."

Finally, having completely reversed the judgment of the Virginia Court of Appeals in the case and affirming the judgment of the District Court at Winchester, Story attempted to avoid the conflict he had created in the 1813 decision when he had ordered the Virginia Court of Appeals to enforce the mandate of the Supreme Court. Instead, he stated appeasingly: "We have not thought it incumbent upon us to give any opinion upon the question whether this court has authority to issue a writ of mandamus to the Court of Appeals to enforce the former judgments, as we do not think it necessarily involved in the decision of this cause." To avoid humiliating the Virginia Court of Appeals, the mandate of the Supreme Court was sent to the District Court where the case arose, for execution of the original judgment of that court.

Story revealed in his letters that "Marshall concurred in every word" of his 1816 opinion. Samuel Warren does not accept the theory that the similarity in style and reasoning in Story's opinion and in Marshall's suggests that Marshall probably wrote it. Rather, in his *History of the Supreme Court* he concluded that Story was merely expressing his own nationalist views and that "it was the Federalist law breakers and traitors of New England who

produced the decision in *Martin v. Hunter's Lessee,* and not the pressure of Marshall's influence." It is relevant to note in this context, that the political leaders of the New England states were then espousing states rights doctrines and even the Federalists believed their position had to be counterbalanced by the thrust of Story's opinion in *Martin v. Hunter's Lessee.* Another commentator on the case, however, believes that Story's opinion reflects such "an amazing comprehensive intimacy with all the twists and turnings of ancient Virginia laws, legislation and practiceal knowledge that no other member of the Supreme Court but Marshall had", he undoubtedly had been very well coached by Marshall before he wrote it.

Johnson's concurring opinion was more in the nature of a dissent. Actually, he was the first "of our noted dissenters" on the Supreme Court. "We pretend not to more infallibility", he admitted, "than other courts composed of the same frail materials which compose this." Appointed to the Supreme Court Bench by Jefferson in 1804 at the age of 32, he was the first Jeffersonian Republican to sit on the court. One third of his opinions from the date of his appointment to his death in 1834, were dissenting. In this respect, it is interesting to note that from 1805 to 1833, 974 majority opinions were rendered by the Supreme Court. Of this number, Johnson wrote only 113, Marshall wrote 450 and Story who joined the court in 1812, wrote 176. Johnson was unique in that out of a total of 70 diseenting opinions written during the period by Supreme Court Justices, he wrote 33, nearly half. Similarly he submitted 24 of the 59 concurring opinions.

In concurring (Beveridge refers to his "inept and unhappy" *dissent*), Johnson noted the "sensitive irritability of sovereign states, where their wills or interests clash", but he conceded that the states had relinquished certain powers to the national government such as in admiralty and possibly bankruptcy. In the final test, Congress had the power to safeguard the national interests, albeit avoiding federal judicial interferences with the State Courts. Thus, it was incumbent upon Congress to select and regu-

late those areas in which the national government and judiciary should be supreme. In this context, however, until Congress so acted, the residual power should remain in the states in the interest of the common good for all. He added that the Supreme Court cannot assert any compulsory control over the state tribunals." Beveridge called Johnson's opinion a "stump speech in which Nationalism and State Rights are mingled in astounding fashion." In agreeing with the judgment of the Supreme Court, Beveridge declares that in doing so Johnson "delivered a Nationalist opinion, stronger if possible than that of Story."

Johnson, believed, he was serving a necessary public purpose in preparing his dissenting opinions and his concurring opinions which had elements of dissent therein. This was a time when Marshall usually spoke for the court as a whole, achieving unanimity of opinion and expression that set a model for later courts to follow. Marshall believed that the strength of the Supreme Court would result from its unity. Before Marshall the Supreme Court justices usually rendered their opinions *seriatim* expressing their thoughts freely. Johnson objected to following Marshall's practice of opinion writing. He explained once, that he was writing his own opinion, "to avoid having an ambiguous decision hereafter imputed to me, or an opinion which I would not wish to be understood to have given." In his concurring opinion in *Martin v. Hunter's Lessee* he stated: "Few minds are accustomed to the same habit of thinking, and our conclusions are most satisfying to ourselves, when arrived at in our own way."

Johnson and Jefferson had a most enlightening exchange of letters on dissenting opinions. Jefferson urged Johnson in 1822 to persuade the Supreme Court justices to return to the old practice of *seriatim* opinions, because the public was entitled to a statement by each judge of his own thoughts on a case—also that Marshall's unanimity role protected "the lazy, the modest, and the incompetent". Johnson replied in a most revealing letter.

"While I was on our State-bench", he wrote, "I was

accustomed to delivering seriatim opinions in our Appellate Court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote. But I remonstrated in vain, the Answer was he is willing to take the trouble and it is a Mark of Respect to him. I soon, however, found out the real cause. Cushing was incompetent. Chase could not be got to think or write—Paterson was a slow man and willingly declined the trouble, and the other two (Marshall and Washington) are commonly estimated as one Judge. Some case soon occurred in which I differed from my Brethern, and I felt it a thing of course to deliver my opinion. But, during the rest of the Session I heard nothing but Lectures on the Judiciary and of Judges cutting at each other, and the loss of Reputation which the Virginia Appellate Court had sustained by pursuing such a course. At length I found that I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all. I therefore bent to the Current, and persevered until I got them to adopt the course they now pursue, which is to appoint some one to deliver the opinion of the Majority, but to leave it to the rest of the judges to record their Opinions or not ad libitum." Eventually, Johnson's independence resulted in a recognition of the Supreme Court justices' right to dissent or concur, with the opinion of the Court, and to express their reasons in a separate opinion—a practice which is followed to this day.

Story's opinion and the judgment of the Supreme Court in *Martin v. Hunter's Lessee* caused a veritable uproar in Virginia. Story was attacked as an "apostate" and "renegade". Roane's position was loudly supported by the Republicans and the Federalist vigorously came to the defense of Story. Retaliation against the Supreme Court justices came almost immediately in Congress. The Republicans there defeated a proposed increase in the salaries of the justices. Story protested that the justices were "starving in splendid poverty" and seriously considered an offer

from William Pinkney, "the undisputed head of the American Bar," to join him in practice and resign from the Bench.

It is interesting to note that the Supreme Court at the time consisted of five Republicans and one Federalist—yet when state rights came into conflict with national sovereignty, the justices invariably dropped their political mantles and docilely followed Marshall in his constitutional interpretations. In a sense, it was realized by the contending parties that in the conflict between the Supreme Court and the Virginia judges, more was at stake than merely a judicial confrontation. Rather it had ominously become a political question and how it would be resolved suggested terrifying possibilities.

The justices of the Virginia Court of Appeals, and the other Republican members of the Bench and Bar of Virginia, however, refused to accept defeat. They had been beaten in *Martin v. Hunter's Lessee,* but they were determined to persevere until their position on Section 25 of the Judiciary law prevailed. A number of opportunities arose subsequent to *Martin v. Hunter's Lessee* to attack the Supreme Court's holding therein. Three landmark cases were appealed to the Supreme Court in 1819, alone, *Sturges v. Crowninshield,* 4 Wheaton 122, *McCulloch v. Maryland,* 4 Wheaton 316 and *Dartmouth College v. Woodward,* 4 Wheaton 518, but each time Chief Justice Marshall and his associates on the Supreme Court, affirming, on the basis of the *Martin* case, the appellate jurisdiction of that court to review constitutionality of State legislation, forged another link in the chain of cases establishing the supremacy of the court as a national institution over state courts. Thus, in *Sturges v. Crowninshield,* the court voided a retrospective insolvency law; in *McCulloch v. Maryland,* upheld the charter of the Second Bank of the United States and declared unconstitutional a state tax law aimed at destroying the bank; and in the *Dartmouth College Case* refused to allow a state by legislation to modify a private corporate charter, and in the process of arriving at these holdings, enunciating the inviolability of the

contract clause of the Constitution and the doctrine of implied powers.

The next real opportunity to attack the Supremacy of the federal courts in matters of judicial review of state court and legislative action arose when *Cohens v. Virginia*. 6 Wheaton 264, came to the United States Supreme Court by writ of error to the Virginia Court in 1821.

In *Cohens v. Virginia,* two itinerant peddlers of lottery tickets, P. J. and M. J. Cohen, sold to people in Norfolk, Virginia, eight half tickets in a Washington, D. C., lottery, authorized by Act of Congress. At the time, lotteries were a popular means of raising funds for public purposes, and the Cohens had little reason to suspect the dramatic results of their transactions. Virginia, however, had by statute outlawed the sale of lottery tickets in the state, and the Cohens were promptly arrested, convicted of such illegal sale, and fined $100 for each offense.

The Trial of the Cohens was before a Burrough Court (Quarterly Session Court), consisting of the Mayor and two justices of the peace, and although the Cohens could have been fined as much as $10,000, the minimum fine was imposed.

Beveridge believes that the importance of the issue in the *Cohens* case was anticipated by the proponents and those in opposition to the ruling on appellate jurisdiction laid 'down by the Supreme Court in the *Martins Case.* How else can you account for the fact, that when a writ of error was sent by the Supreme Court to the Borough Court in Virginia, for it was the last court of resort in such matters, no other than Daniel P. Ogden and William Pinkney appeared on behalf of the Cohens? Obviously, as Beveridge words it, what was really at stake in the *Cohens Case* was "embattled localism defying the power of the National Government." For Ogden and Pinkney were the two most highly priced attorneys at the American Bar at the time and "the fee of either of these men, would have been a hundred times more than the sum involved."

The Virginia Counsel, Messers Barbour and Taylor

were under direct orders from the State authorities not to argue on the merits of the conviction, before the Supreme Court. They were, instead, cautioned to limit their argument to the jurisdiction of the Supreme Court over final decisions of the Court of last resort in Virginia. They were actually instructed, that if the Supreme Court directed them to argue other issues, they should refuse and return home. They repeated the arguments presented to the court in the *Martins Case,* and also one on the Eleventh Amendment in that the *Cohens* case was a criminal action in which the sovereign state of Virginia was a party as in all criminal prosecutions. The appeal to the Supreme Court was therefore, in effect, a suit against a state by a private person, without its consent. Chief Justice Marshall, in his opinion, destroyed this argument on the theory that a suit by a private person against a state was not in issue, but to the contrary, it was one in which the State had instituted a case against a private person in the form of a prosecution and therefore the eleventh amendment was not applicable.

Ogden stood pat on the *Martins* Case ruling. He could see no need to argue the general question whether the Supreme Court had an appellate jurisdiction, in any case, from the state courts, because "it had been already solemnly adjudged by this court, in the case of *Martin v. Hunter.*" All that had to be determined was whether the case arose under the Constitution and laws of the United States and by authority of the *Martin's* case, the Supreme Court could exercise its jurisdiction in an appellate form.

Thus, once again, the Supreme Court was presented with the issue.

Chief Justice Marshall, seized the opportunity presented by the *Cohens Case* to establish firmly as a matter of law, the decisive appellate jurisdiction of the Supreme Court. In an eloquent opinion, which his biographer, Beveridge describes as "one of the strongest and most enduring strands of that mighty cable woven by (Marshall) to hold the American people together as a united and imperishable nation", Marshall in his distinguished, magisterial style proclaimed:

"Let the nature and objects of our Union be considered; let the great fundamental principles, on which the fabric stands, be examined; and we think the result must be, that there is nothing so extravagantly absurd, in giving to the Court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which impart this power should be restricted by a forced construction."

Marshall also asserted "that a case arising under the Constitution or laws of the United States is cognizable in the Courts of the Union whoever may be the parties to the case". To Marshall, "a case in law or in equity consists of the right of one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either."

Marshall noted that the state court judges were bound by the Supreme Court interpretations of the laws, treaties, and public acts of the United States.

"This is the authoritative language of the American people"; he insisted, "and if gentlemen please, of the American States. . . The general government, though limited in its objects, is supreme with respect to these objects. This principle is a part of the Constitution and if there is anyone who denies its necessity, no one can deny its authority."

Thus, having decided that an act of Congress and its interpretation by the Supreme Court, supersedes a state law, and that section 25 of the Judiciary Act constitutionally authorizes the Supreme Court to review any conviction in which it is claimed that the federal enactment voids the conviction, Marshall resorted to the tactic he used in *Marbury v. Madison* to make his holding more palatable to the states rights advocates. He found that although the Supreme Court had the power to reverse the Virginia conviction, still, the Cohens had been properly convicted by the state authorities. Construing the federal lottery law, he concluded that it did not authorize the sale of lottery tickets in states where such sales were unlawful. He therefore let the conviction stand.

Haines believes that Marshall's opinion in *Cohens* "bears the earmarks of a political manifesto designed to humiliate the states and to strengthen the forces of nationalism. A relatively insignificant cause was made the occasion for one of Marshall's strongest Federalist pronouncements."

Constitutional authorities agree that Marshall's arguments in *Cohens v. Virginia,* to a large extent restate Story's points made in the *Martin's* case. Stylists, however, have applauded Marshall's much more logical and persuasive reasoning. According to Beveridge, his opinion was "magnificent".

When Marshall and his brother, James, first became interested in purchasing the Fairfax Estates, Marshall, particularly, was attracted to that part of it known as "Leads Manor". Eventually, he hoped, in the established Virginian tradition of acquiring land wealth, that it would become an inheritance for his large family.

By the time Marshall became Chief Justice of the United States, he had transferred title to these lands to members of his family, but to his dying day, his love for this tract of land "at the foot of Little Cobbler Mountain" compelled him to return to it as though he were on a pilgrimage. Every year he paid a visit to his son, James Keith Marshall, who resided in "Leeds Manor", to savor again the natural charm of "one of the most beautiful spots in all the world."

After the death of his wife, his "beloved Polly", in 1831, Marshall planned to leave his house in Richmond, Virginia, and to make his home at "Leeds Manor". When Marshall told his children and grandchildren at a family meeting of his desire to live with them at Leeds Manor, one grandchild exclaimed, "Oh, grandpa, I am so glad you are coming to live with us, you shall have turkey and plum-cake every day for your dinner." "Ah! my dear little girl", was his amused reply, "You will soon kill your poor old grandfather, if you keep him on such a diet as that."

Unfortunately, Marshall's death on July 6, 1835, gave

him little opportunity to enjoy it with the peace and honor he deserved.

EPILOGUE

It is now recognized that the Supremacy of the Supreme Court in matters of judicial review of state court and legislative action, was finally resolved by Marshall in the *Cohens* Case. As Professor Bernard Schwartz in his *Powers of Government* has expressed it, "Certain it is that Marshall's magisterial opinion . . . conclusively settled . . . the competence of the high bench to review the decisions of state courts. Since *Martin v. Hunter's Lessee,* and *Cohens v. Virginia,* state attempts to make themselves the final arbiters in cases involving the Constitution, laws, and treaties of the United States have been foredoomed to defeat before the bar of the highest tribunal."

Marshall's decision in *Cohens* infuriated the Virginia Bench and Bar. Spencer Roane, once again led the attack on the Court. Writing under a pseudonym, Roane warned that "a death blow has been aimed at the very existence of the states." The reason for the decision "can only be accounted for from that love of power which all history informs us infects and corrupts all who possess it, and from which even the eminent and upright Judges are not exempt." He then recommended that Section 25 of the Judiciary Act be repealed and that a constitutional amendment limiting the jurisdiction of the Supreme Court and, if necessary, abolishing the Court be proposed by the State of Virginia. "The career of the High Court must be stopped," he insisted, "or the liberties of our country are annihilated."

James Madison attempted to be more reasonable in his criticism. He noted that despite the power of the High Court, still Congress could enact legislation to "correct" its holdings. Jefferson proposed that the most feasible way to curb "the Judiciary in their enterprises in the Constitution," was to arrange for a "joint protestation of both Houses of Congress that the doctrines of the Judges in the

case of Cohens . . . are contrary to the provisions of the Constitution of the United States." The Virginia Legislature, however, refrained from taking any action on it save to publicly support Roane's position by resolution.

Writing to Story, Marshall, himself was led to remark that his opinion in the *Cohens Case* "has been assaulted with a degree of virulence transcending what has appeared on any former occasion."

The importance of Marshall's decision to the effect that the Supreme Court has appellate jurisdiction over state court decisions, cannot be denied. Justice Holmes wrote in 1913, that "I do not think the United States would come to an end if we lost our power to declare an act of Congress void, "but he added, "I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." Chief Justice Hughes added in 1928: "It is evident that without that power to maintain the Supremacy of the Federal constitution over state legislatures the Constitution would have been a dead letter in some of its most important applications."

The disobedience of state courts to Supreme Court orders did not completely abate as a result of the *Martin's* and *Cohens'* decisions. There are a number of blatant cases of such disobedience recorded in the annals of the Supreme Court. There is the 1830 case in Georgia of a Cherokee Indian named "Corn Tassel", or "George Tassels". Convicted by the Georgia State Court for the murder of another Indian within the territory occupied by the tribe, and sentenced to be hanged, the execution was scornfully ordered by the state authorities and accomplished, even though a writ of error from the Supreme Court to the Georgia Court, technically superseded the sentence until the appeal was decided, according to federal law. Typical of the times, Justice Story reacted to this defiance of the Supreme Court's mandate by calling it "intemperate and undecorous." The *United States Telegraph,* noted in one of its editorial that "the position in which the Supreme Court is placed by the proceedings of Georgia demonstrates the absurdity of the doctrine which contends that the Court is clothed with supreme and absolute con-

trol over the states." Andrew Jackson, then President of the United States, was beseeched by northern newspapers to enforce the laws and sustain the court process. He remained silent, however, and it is interesting to note, that rather than bringing the Georgia officials concerned to justice, a determined effort was made early in 1831, in Congress, to repeal the 25th section of the judiciary law—which, however, failed. Georgia, again, in 1832, in *Worcester v. Georgia*, 6 Peters 515, ignored the Supreme Court writ without punishment.

Years later, in *Ableman v. Booth,* 21 Howard 506 (1859), Chief Justice Taney suffered a similar fate when the Wisconsin Supreme Court ignored a Supreme Court writ of error addressed to it, on the ground that the Act of Congress involved, was unconstitutional. Taney held, however, that "no state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him. . . And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this (Supreme) Court to decide ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision. . . . The judgment of a state court where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the state." Professor Corwin believes that in the *Ableman* case, Taney "enhanced the federal judicial power to a degree beyond that envisaged even by Marshall and Story."

As late as 1880, Justice Field, in *Williams v. Bruffy,* 102 U. S. 248, in which a Virginia Court refused to enforce a mandate of the Supreme Court, stated that the appellate jurisdiction over the judgments of the State Courts "passed beyond the region of discussion in this Court more than a half a century ago. As early as 1816, in the celebrated case of *Martin v. Hunter,* this court, in an opinion of unanswerable reasoning from the general language of the Constitution asserted its appellate jurisdiction over the state courts in the case mentioned in the Act."

It should also be noted in this context, other Constitu-

tional issues have been raised with reference to Supreme Court review of State Court decisions than those heretofore mentioned.

Section 25 of the Judiciary Act of 1789 was superseded in 1934, when the "writ of error" was replaced by "appeal".

Section 1257 of Title 28 of the *United States Code* now provides that final judgments or decrees rendered by the highest court of a state in which a decision could be held are reviewable by the Supreme Court as follows:

(1) By appeal when a state court holds invalid a treaty or statute of the United States;

(2) By appeal when the constitutionality of a state statute, or its conflict with a treaty or law of the United States is at stake and the state court upholds its validity;

(3) By writ of certiorari when the validity of a treaty or statute of the United States is questioned, or when the validity of a state statute is questioned, as very repugnant to the Constitution, Treaties or laws of the United States, or "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, Treaties or statutes, or a Commission held or authority exercised under the United States."

As the relationship between the federal judiciary and the State courts has always been of a highly sensitive and delicate nature; certain safeguards hve been established not to aggravate it.

Today federal courts will not assume jurisdiction over state cases for review, even though a federal question is involved, until all state remedies have been exhausted and a final judgment has been rendered in the state's court system.

What is meant by "final judgment" and "exhaustion of state remedies" have been subject to conflicting disagreement.

In essence, title 28, section 1257 of the *United States Code* has been construed to allow a case decided in a state court to be reviewed by the Supreme Court after the highest appellate court of last resort in the state has acted,

through direct review, by appeal, or by writ of certiorari. When an application by a person in state custody for a writ of habeas corpus to a lower federal court is invalid, the Supreme Court has assumed jurisdiction through direct review. However, when the writ of habeas corpus is sought by a person in state custody under a federal claim which can be raised on appeal, failure to exhaust all state remedies will preclude federal review. The situation is different in civil cases involving denial of federal rights. There it is not necessary to exhaust all state remedies before seeking redress in a federal court.

Another interesting constitutional facet to federal and state court relationships is the obligation of the state courts to assume jurisdiction in certain situations involving federal rights.

As Justice Story brought out in the *Martin Case,* the Constitution, laws and treaties of the United States are also part of the law of the various states. Thus it "is imperative upon the state judges, in their official and not merely in their private capacities" to enforce and uphold them. "From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the laws and treaties of the United States—"the supreme law of the land.' "

Today state courts, not only have the jurisdiction, but the duty, to enforce rights arising under federal law, unless by federal statute, exclusive jurisdiction has been granted to federal courts in the matters concerned. This was made quite clear in *Claflin v. Houseman,* 93 U.S. 130 (1876) in which Justice Bradley held for a unanimous court:

"If an act of Congress gives a penalty to a party aggrieved without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no rea-

son why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws."

As a result of this development, state courts must accept jurisdiction involving federal law in a proper case, even though to do so would be contrary to state policy. When in *Second Employers' Liability Cases,* 233 U.S. 1 (1912), the Supreme Court of Errors of the state of Connecticut held that the state policy was contrary to the rights bestowed by the Federal Employers' Liability Act and therefore unenforcible in Connecticut, the United States Supreme Court, in unanimously reversing that court, declared: "The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted the Act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state."

The obligation of the state courts to assume jurisdiction over proper federal matters has even been extended to penal cases, provided of course, Congress has allowed for concurrent federal and state jurisdiction thereon. The state courts have no discretion in these situations. Thus, in *Testa v. Katt,* 330 U.S. 386 (1947), when the Rhode Island Supreme Court held that a state was not required to enforce the penal laws of another jurisdiction, the Supreme Court replied: "The policy of the federal act is the prevailing policy in every state."

Another interesting facet to this federal-state judicial relationship is that when the Supreme Court reverses the judgment of a state court, the Supreme Court generally avoids a straight reversal but rather remands the case to the state court for action based on the Supreme Court's

opinion. The phrase used is "for further proceedings not inconsistent with this opinion", which allows the state court the opportunity to construe its own state laws in light of the constitutional or federal law expressed by the Supreme Court.

The *Martin Case* was significant also, in that Story ruled on the power of the Supreme Court to remove cases from the State Courts to federal jurisdiction. Federal law was established therein as supreme, and state law became subordinate to it. Today the Federal Rules of Civil Procedure provide for removal of federal suits, and the right to do so is governed by the concept of federal due process.

What is the effect and significance of a denial by the Supreme Court of the petition for review on writ of certiorari to a state court? Justice Frankfurter has made this clear in *Maryland v. Baltimore Radio Show, Inc.,* 338 U.S. 912 (1950), in which the Supreme Court denied a petition for writ of certiorari to the Court of Appeals of Maryland:

"This court now declines to review the decision of the Maryland Court of Appeals," he wrote. "The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the court's procedure. It simply means that fewer than four members of the court deemed it desirable to review a decision of the lower court as a matter of 'sound judicial discretion'. Rule 38, par. 5. A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different justices to the same result. This is especially true of petitions for review on writ of certiorari to a state court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be a judgment of a state court of last resort; the decision may be supportable as a matter of state law, not subject to review by this Court, even though the State also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself to review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may

raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudications has its own time for ripening."

"Since these are these conflicting, and to the uninformed, even confusing reasons for denying petitions for certiorari, it has been suggested from time to time that the court indicate its reasons for denial. Practical considerations preclude. . . . During the last three terms the courts disposed of 260, 217, 224 cases, respectively on their merits. For the same three terms the court denied, respectively, 1,260, 1,105, 1,189 petitions calling for discretionary review. If the Court is to do its work, it would not be feasible to give reasons, however brief, for refusing to take these cases. . . . Failure to record a dissent from a denial of a petition for writ of certiorari in no wise implies that only the member of the Court who notes his dissent thought the petition should be granted."

Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this court has vigorously insisted that such a denial carries with it no implications whatever regarding the Court's view on the merits of a case which it has declined to review. . ."

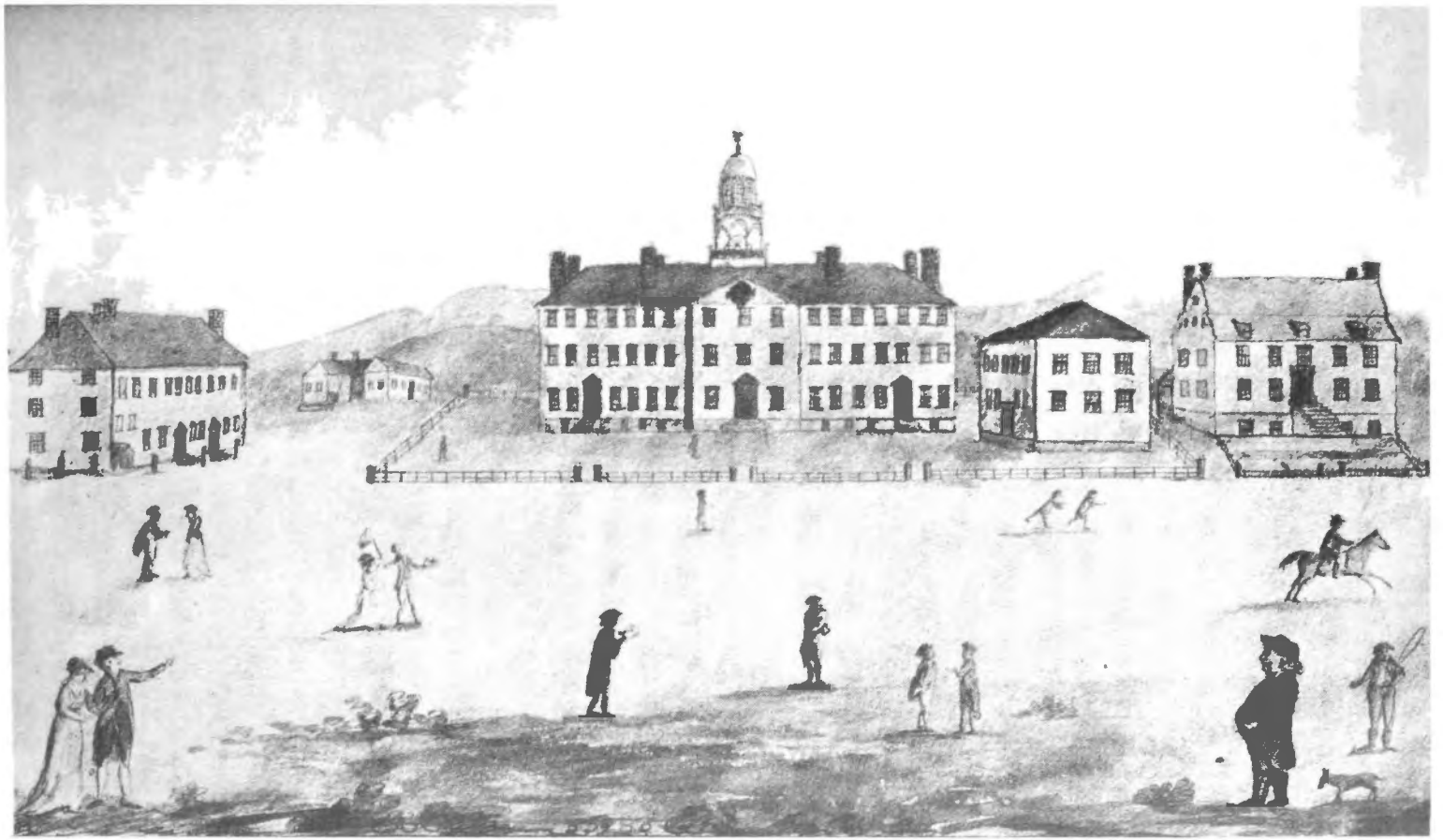
In light of this explanation, it is understandable why a denial of a petition for writ of certiorari is not prejudicial to a later application. This was made clear in *Brown v. Allen,* 344 U.S. 443 (1953) by Justices Reed, Frankfurter and Jackson. In *Brown v. Allen,* the court denied a writ of certiorari in a criminal proceeding but did not allow such denial to prejudice a later application by the prisoner for habeas corpus relief in a federal district court.

Until Marshall's court curbed the expanding claims of state tribunals by asserting against them, the power of the Supreme Court to redetermine their decisions, involving constitutional rights, judicial review was not an entirely acceptable common practice to follow. Now it is completely acceptable, and it is rare today for the

President and the states to even suggest challenging a Supreme Court mandate. Such acquiesence differs greatly from the uproar that ensued in Virginia from the Supreme Court's decisions in *Martin v. Hunter's Lessee* and *Cohens v. Virginia*.

Willard Hurst suggests another thought with reference to judicial review which puts a new dimension on the significance of the *Martin* and *Cohens* cases:

"This is to say that the mere possession of the power of judicial review gives the opinions of the Supreme Court an extra prestige in wholly unrelated matters. The court is a little like the multimillionaire whose opinion is asked on Paris art or the affairs of the world when he returns from Europe—perhaps his possessions should not give these extraneous opinions any added weight, but nevertheless they do . . . . that prestige is directly useful to basic liberties. The libertarian decisions of the Hughes Court in the 1930's in such cases as *Near* v. *Minnesota,* 283 U.S. 697 (1931). *Herrdon v. Lowry,* 301 U.S. 242 (1937) and *Lovell v. Griffin,* 303 U.S. 44 (1938) were accepted by the states which received them in remarkable good grace. . . The acceptance of each of the decisions mentioned is, to some unknown but real extent, aided by the fact that the court which made them had in addition the power of judicial review."



Dartmouth College in 1801

The Dartmouth College Case

The Corporate Entity in American Economic Development

The Dartmouth College Case dramatically changed the course of American economic development, yet it was barely noticed by the public press at the time. Even more startling, the great point decided was not clearly foreseen by the framers as involving a right worthy of preservation in the new Constitution. In fact, the point was considered of such little importance that even the astute attorneys who argued the case on appeal before the Supreme Court attached little weight to it, merely suggesting it as incident to their main argument. Paradoxically, too, this historic decision whose consequences were so important for the country, evolved out of an improbable conflict so unrelated to the legal outcome, that no one had cause to foresee its ultimate effect.

On December 9, 1818, Associate Justice Story of the Supreme Court of the United States wrote: "The next term of the Supreme Court will probably be the most interesting ever known." That Story's prediction was justified is self-evident in that the Court decided three of the most monumental Constitutional cases in American law during that term: *Dartmouth College v. Woodward, Sturges v.*

Crowninshield and *McCulloch v. Maryland.* As the Court's opinion in all these cases was written by Chief Justice Marshall, it is not without reason that the year 1819 has been memorialized as Marshall's *Annus Mirabilis.*

Little did anyone suspect that the founding around 1760 of a remote and unknown wilderness charity school for Indians at Lebanon, Connecticut, by a clergyman, Eleazor Wheelock, known as Moor's Charity School, would flare up into a theological controversy of such bitterness and political import that it would eventually result in a decision which in the words of Henry Cabot Lodge "extended the jurisdiction of the highest federal court more than any other judgment ever rendered by them. . . A decision in fact, which has been cited more often perhaps than any other handed down by the Court." Certainly Eleazor Wheelock had no reason to believe so. His motive grew out of a missionary spirit, seeking only the redemption of the heathen Indians living in New England at the time.

One of Wheelock's best students was a young Indian convert to Christianity named Samson Occom. Occom was not only bright but an inspiring orator as well. Wheelock, seeking financial assistance for his missionary work, arranged in 1765 for Occom and a preacher named Nathaniel Whitaker to visit England to solicit funds. Occom was to be exhibited as a successful product of the School, and Whitaker was to try to capitalize on Occom by exhorting the aristocracy to support the school.

London society was titillated by Occom's charm and succumbed to his personality. If the school could convert a heathen like Occom to such a civilized state, then Wheelock's educational and missionary work definitely warranted financial backing. Before long, under the sponsorship of William, The Earl of Dartmouth and Secretary of the Colonies, more than eleven thousand pounds were raised, an impressive amount of money for the time. A Board of Trustees was established, headed by the Earl of Dartmouth to control and administer the fund as a trust.

On December 13, 1769, John Wentworth, the Royal

Governor of the Province of New Hampshire, granted to Wheelock a charter in the name of George III to establish not only a college for Indians, but also to provide higher education for the white youth of New England. Actually, Wheelock intended to maintain Moor's Charter School independently for missionary work and training of Indians.

After citing the work and contribution of Wheelock in establishing a charity school for Indians and white youth to spread "The knowledge of the great Redeemer among the savage tribes," as well as the trust headed by the Earl of Dartmouth, the Charter established "Dartmouth College" for the education of Indians and provided that it would be governed by "one body corporate and politick . . . by the name of the Trustees of Dartmouth College."

The trustees were created under the charter "forever hereafter . . . in deed, act, and name a body corporate and politick" with all necessary powers to effectuate the purpose of the Charter. The Charter provided for twelve trustees "and no more," prescribing a quorum of seven, and granted "the major part of any seven or more of them convened" the power to appoint and remove the President of the College, to hold title to the college properties, fill vacancies in the Board of Trustees, and to make all necessary rules and regulations to govern the college, "to have and to hold . . . forever." As "founder" of the College, Eleazor Wheelock was designated by the Charter as its President, and he was empowered "to appoint" by his last will his successor who would be permitted to serve as President at the pleasure of the Trustees.

The trustees of Moor's Charity School looked with suspicion upon Wheelock's application for incorporation. They saw it as an attempt to circumvent the purpose of the Trust and to deprive them of their control over the School. But their protests were in vain. The College was established at Hanover on lands granted by the Governors of New Hampshire and Vermont.

Dartmouth College flourished and by the time Eleazor Wheelock died in 1779, the student body consisted mainly

of white students. By his will, Wheelock bequeathed the presidency of Dartmouth College to his son John. Only 25 years old then, John had already risen in the Revolutionary Army to Lieutenant Colonel on the staff of General Horatio Gates. The Trustees urged him to accept the high position, as they desired to continue the Wheelock tradition. John, a vigorous and highly opinionated young man, was persuaded. He resigned from the Army to assume the Presidency immediately.

For a while all went well. John was a Federalist as were most of the Trustees, so harmony reigned. But then a most unusual series of events occurred which, although local in origin, aroused the bitterest passions, finally errupting into vituperative religious animosity and extravagant political debate.

Starting with some name-calling by a member of the Congregation at Hanover to the effect that a certain Rachel Murch had a character "as black as Hell," the petty squabble evolved into a head-on battle between Congregationalists and Presbyterians. Presbyterians attacked the exemption of the income of Congregationalist ministers from state taxation, since the income of other preachers was not similarly exempted. Other charges and counter-charges arose over the right of the Professor of Theology at Dartmouth College to preach in the local churches, as well as the attendance of college students for worship.

Then a Republican, Nathaniel Niles, was elected to the Board of Trustees of Dartmouth College. Niles, a lawyer and later a judge, also considered himself an authority on theology. Strong-willed and domineering, he was, according to Thomas Jefferson, "the ablest man I ever knew." Niles was a Congregationalist lay leader. Young Wheelock, however, was an ardent Presbyterian. With characters similarly dictatorial and unswerving, the two men became deadly antagonists. Thus, the religious conflict spilled over into the Trustees' meetings. For, under the influence of Niles, the Trustees filled vacancies on the Board with Anti-Wheelock men, until finally the Anti-Wheelock faction achieved control.

As the feud between the Trustees and Wheelock deepened, it gradually took on political overtones. The Congregationalists, who were more conservative and rigid in their religious beliefs than the Presbyterians, followed the Federalist line. This was reflected in their advocacy of their established rights under the Charter of Incorporation of Dartmouth College. The Presbyterians, however, greatly influenced by Calvinistic doctrine, were enthusiastic adherents of Jeffersonian Republicanism, favoring "reform" in the management of the College.

By 1813, a political battle in New Hampshire to control judicial appointments became part of the controversy raging amongst the Trustees. The situation was aggravated when the Federalists won control of the New Hampshire Legislature and enacted laws "reforming" the judiciary and replacing Republican judges with Federalist judges. Greatly incensed by this "outrage," the Republicans fought back savagely in a heated political campaign to regain control over the Legislature.

By strange political maneuvering, Wheelock, who had originally been a Federalist, changed sides during his controversy with the Trustees and gathered around him Anti-Federalists to support his cause. On the other hand, his opponents on the Board of Trustees, led by U. S. Senator Thompson, a Federalist who was quite influential and of considerable political importance, sought help amonst the Federalists and Conservatives.

This struggle for power finally hastened to a crisis in 1815 with the anonymous publication of two pamphlets entitled: "Sketches of the History of Dartmouth College and Moor's Charity School" and "A Candid and Analytical Review of Sketches." The author of these pamphlets strongly condemned the activities of the Trustees and questioned their authority to limit President Wheelock's prerogatives under the Charter. Incensed by these charges, which they denounced as a "gross and unprovoked libel," the Trustees retaliated with two pamphlets of their own: "A Vindication of the Official Conduct of the Trustees" and "A True and Concise Narrative of the Origin and Progress of the Church Difficulties." And now the

conflict burst into the public domain. For these pamphlets were widely distributed by the feuding factions, adding greatly to the public excitement. Aggressive public debate ensued on the "Stump" and in newspapers on whether the College administration should be "reformed."

Realizing that he had lost control of the Board of Trustees and aware of the antipathy of the Faculty and students of the College, Wheelock appealed to the Legislature to investigate the dispute and restore his authority. The Legislature appointed a special committee to hold hearings on the matter. Wheelock had always considered Daniel Webster, a graduate of Dartmouth College, to be his friend and legal counsel. He immediately wrote to Webster to represent him before the Legislative Committee and enclosed twenty dollars as a retaining fee. At the time Webster was a Federalist Congressman from New Hampshire and very much aware of the political implications of the struggle for power. His political patrons and best friends were Jeremiah Mason, who was Counsel to the Trustees of the College, and Senator Thompson, who was leading the fight against Wheelock. Although Webster was sympathetic to Wheelock's personal plight, he was not too anxious to be involved politically with the Republicans.

Therefore, when the legislative hearing was held, Webster was conspicuous by his absence—much to the chagrin of Wheelock, who claimed bad faith on Webster's part. When Josiah Dunham, who represented Wheelock at the hearing, learned that Webster was actually considering siding with Wheelock's enemies, he accused him of "treachery." Webster, offended, replied that Wheelock's request to represent him before a legislative committee had not created a professional relationship; in any event he had not accepted the offer. "I am not so fully convinced as you are," he continued "that the President is altogether right and the Trustees altogether wrong." Incidentally, whether Webster returned the twenty-dollar fee is unknown to this day.

Finally, the Trustees could no longer be contained.

Against the advice of Jeremiah Mason, who feared an adverse effect on the Legislative investigation, they removed Wheelock from the Presidency on August 26, 1815, and two days later elected Reverend Francis Brown of Maine to succeed him. Wheelock's supporters were greatly agitated by this summary proceeding. During the 1816 political campaign which raged in New Hampshire, the College issue played a conspicuous part.

The election of 1816 brought complete victory to the Republicans. They not only won control of both houses of the Legislature, but also put in office their candidate for the Governorship, William Plummer. Plummer was a staunch Jeffersonian and Wheelock's fortunes took a quick change for the better.

Now the College issue became a purely political one. In his message to the Legislature on June 6, 1816, Governor Plummer denounced the Dartmouth College charter as reflecting monarchical principles in that it provided for a self-prepetuating Board of Trustees.

This was "hostile to the Spirit and genius of a free government." Rather, he maintained, the Trustees should be elected by another body, for the College "was founded for the public good, not for the benefit or emolument of its trustees." Governments have a right to amend and improve such acts of incorporation. He then strongly recommended to the Legislature that it take action on the Dartmouth College Charter.

Governor Plummer sent a copy of his message to Thomas Jefferson, who replied on July 21, 1816. Applauding Plummer's plan as "replete with sound principles and truly Republican," Jefferson added, "The idea that institutions established for the use of the nation cannot be touched nor modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may, perhaps, be a salutary provision against the abuses of a monarch, but it is most absurd against the Nation itself. Yet our lawyers and priests generally inculcate this doctrine; and suppose that preceding generations held the

earth more freely than we do; had a right to impose laws on us, unalterable by ourselves; and that we, in like manner, can make laws, and impose burdens on future generations, which they will have no right to alter, in fine, that the earth belongs to the dead, and not to the living."

Heeding the Governor's recommendation, a bill was quickly introduced in the Legislature to reform the Dartmouth College Charter and was passed on June 27, 1816. The name of Dartmouth College was changed to Dartmouth University, the number of Trustees was changed from twelve to twenty-one and a Board of Overseers of twenty-five was established with a veto power over the acts of the Trustees. Annual reports were to be submitted to the Governor by the President on the administration of the College. The Governor and the Council of State were authorized to appoint the twenty-five Overseers and the additional Trustees to fill up the Board of Trustees to twenty-one. Incidentally, one of the Overseers appointed was Joseph Story, Associate Justice of the Supreme Court of the United States, but he did not accept. Thus, not only was Dartmouth College placed completely under the domination of the Republican Legislature, but in essence the question arose whether the College charter itself was annulled.

The passage of the law evoked bitter controversy. A formal protest was entered by seventy-five members of the House in its Journal. Written remonstrances were submitted by Senator Thompson and many others beforehand. Thompson prophetically warned that the "tendency of the bill . . . is to convert the peaceful retreat of our college into a field for party warfare." The Trustees of the College were particularly vociferous. They passed resolutions heatedly denoucing the law and setting forth many reasons for doing so, among which they suggested by way of incidental comment the possibility that the law violated the Constitutional provision on impairment of the obligation of contracts. For, they maintained, the Charter of Dartmouth College was a contract between the state and the twelve original trustees and "certain rights and privileges were vested in them and their successors for the

guarantee of which the faith of government was pledged by necessary implication."

The new corporation, they warned, "will be deemed by the courts of law altogether diverse and distinct from the corporation to which all the grants of property have hitherto been made." "If the act . . . has its intended operation and effect," they concluded, "every literary institution in the State will hereafter hold its rights, privileges and property, not according to the settled established principles of law, but according to the arbitrary will and pleasure of every successive legislature."

The Trustees of the College decided to fight back. They refused to recognize the new law or for that matter act under it. As far as they were concerned, the new University did not exist. The new Trustees, however, removed Brown as President and reinstated John Wheelock as President, but as he was too ill to serve, William Allen was appointed acting-President. They then elected William H. Woodward, the Secretary-Treasurer of the old Trustees, who had decided to cast his lot with the new Trustees, Secretary-Treasurer of the new Board and placed in his custody the corporate records and seals. In addition, they ousted the officers, faculty and students from the college buildings. Most of the students remained loyal to the College and moved with the officers and faculty to nearby Rowley Hall, where classes were held as if nothing had happened. The new University, with hardly any students attending, remained but a bare skeleton of its former self. In fact, the College operation was so successful, the Legislature, in reprisal, enacted laws imposing a fine of $500 for every act of anyone presuming to act as trustee or officer of the old College.

During this period of travail, the old Trustees were not sitting by idly. They called upon the leading attorneys of the New Hampshire bar to advise them on the legal steps to take. These were Jeremiah Mason, Jeremiah Smith and Daniel Webster. Not only were they superlative lawyers, they were also numbered among the most astute politicians in the State.

Once asked "who was the greatest lawyer he had ever

known," "Chief Justice Marshall" was Webster's reply. "But," he continued after a pause, "if you took me by the throat and pushed me to the wall, I should say Jeremiah Mason." Mason was a huge man, standing six feet six, and he was noted as the wisest of counsellors in New Hampshire. A Federalist, he had been Attorney-General of the State and its United States Senator. He was so highly considered that Governor Plummer, a Republican, offered him the Chief Justiceship of the new Supreme Court of New Hampshire in August, 1816. Webster was a protegé of Mason's and had worked very successfully with him on many cases. Only 35 at the time, Webster had already achieved renown at the bar and served as Congressman from New Hampshire. As a legal team, Webster and Mason were unsurpassed by any other two lawyers at the time in forensic persuasion and ability. Jeremiah Smith, a former Congressman and Chief Justice of the State, was a tower of strength, the most learned lawyer of the New Hampshire Bar. Webster later said of him: "He knows every thing about New England, and as to law he knows so much more of it than I do, or ever shall, that I forbear to speak on that point."

On the advice of their counsel, the old Trustees brought an action in Trover against Woodward for the recovery of the books of record, charter, common seal and books of account—all of the value of $50,000—which they alleged to be their property, In defense, Woodward pleaded the "Reform" laws of 1816 and his appointment thereunder as Trustee of the new University. And thus, the issues were finally framed and the historic case of *The Trustees of Dartmouth College v. Woodward* began to wend its way through the courts.

The joinder of issue in the case greatly excited the public and was heatedly debated in political and legal circles. The new Trustees, determined to prevail, retained extremely able counsel to represent Woodward. George Sullivan, the Attorney General of New Hampshire, was not only well read in the law, but a classical scholar as well. Shirley, the historian of the Dartmouth College

Case, considered him an "excellent special pleader; swift to perceive, prompt to act, and full of resources. He relied too little on his preparation, and too much upon his oratory, his power of illustration and argument. But, neither the Court, the jury, nor the people ever grew weary of listening to his silver tones or his arguments, that fell like music on the ear." Ichabod Bartlett was but 31 years old when the case was tried. He came from the same town as Webster and later was called "The Little Giant." He was "indefatigable in preparation, eloquent in the highest sense, ready, witty, and a popular idol. In the art of gaining verdicts, he was confessedly the equal of any engaged in this trial." A battle of giants was anticipated and actually such an intellectual debate as took place before the Court has probably not since been matched in New Hampshire to this day.

To expedite a decision, the parties consented to carry the cause directly to the Superior Court by appeal. After the defendant pleaded the general issue, the facts in the case were then agreed upon and drawn up in the form of a special verdict to be found by the jury. Thus, the case was taken directly to the Superior Court of Appeal of New Hampshire and argument was set for the June Term, 1817, of the Superior Court in Grafton County.

Politics had become so intertwined with judicial affairs in New Hampshire that it had been taken for granted that the new Republican controlled legislature would remove the Federalist judges on the Superior Court Bench. No one was surprised therefore when the "reform" Judiciary Act of 1813 enacted by the Federalist controlled Legislature was repeated and a new Superior Court constituted by the Republicans. Chief Justice Jeremiah Smith thus found himself without a judicial position and retired to private practice. Governor Plummer then appointed William M. Richardson as Chief Justice and Samuel Bell and Levi Woodbury as Associate Justices.

It would appear that the argument took place before a partisan bench. Beveridge states as a matter of fact that all three Justices appointed by Governor Plummer were

Republicans. Shirley, however, disagrees maintaining that Richardson was a Federalist and his associates Anti-Federalists. Be it as it may, the court was a highly respectable one. Even Mason was forced to admit that "three men so well qualified as the present Judges, and who would accept the office, could not be found in the state." Actually, Levi Woodbury, after a distinguished career, later was appointed to the Supreme Court of the United States and just missed being elected President of the United States by his untimely death.

The "College" case was argued twice—first in June and then in September 1817. On the first hearing, Mason and Smith argued for the plaintiffs and Bartlett and Sullivan for the defendant. Webster was reluctant to associate with Mason and Smith on the first argument, perhaps out of diffidence for his own comparative youth and their advanced political standing. When the case was continued to the next term, Webster was urged by Mason and Smith to join them. Webster wrote to Mason on September 4, 1817 from Boston: "Judge Smith has written to me, that I must take some part in the argument of this College question. I have not thought of the subject, nor made the least preparation; I am sure I can do no good, and must, therefore, beg that you and he will follow up in your own manner, the blows which have already been so well struck. I am willing to be considered as belonging to the cause and to talk about it, and consult about it, but should do no good by undertaking an argument. If it is not too troublesome, please let Mr. Fales give me a naked list of the authorities cited by you, and I will look at them before court. I do this that I may be able to understand you and Judge Smith." Webster was finally persuaded, however, to appear and on the second argument, he closed on behalf of the Trustees.

The first hearing held at Haverhill was inconclusive, so the case was continued to permit both sides to submit additional arguments. On the second hearing held at Exeter on September 19, 1817, Mason made the opening plea. He was impressive. His two-hour address reflected his

admirable legal learning as well as his simple, direct, yet cogent style. It was a "model of condensed logic." John Chipman Gray later commented that "it reads like a judicial opinion, but an opinion free from the diffuseness which mars the judgments of many eminent Judges of the time, such as Chief Justice Marshall and Judge Story."

Mason obviously felt deeply about the issues and spoke with intense conviction. The acts of the Legislature, which reorganized the College, he maintained, were not obligatory on the plaintiffs: 1) because they were not within the general scope of the legislative power; 2) because they violated certain provisions of the Constitution of New Hampshire restraining the legislative power; and 3) because they violated the Constitution of the United States.

Timothy Farrar, who reported the proceedings, devotes forty-two pages to Mason's brief. Twenty-three of these pages pertained to the first point, eight to the second and only four pages to the third. Thus, the most important point of all, the one which eventually established the great constitutional rule involving the impairment of the obligation of Contracts, was barely touched upon, not only by Mason but by Judge Smith and Daniel Webster as well. Mason contended, with reference to his third point, that Article I, Section Ten of the Federal Constitution provides that no state shall pass a law "impairing the obligation of contracts." When the legislature grants a charter to a corporation, which accepts it, all the elements of a contract are present, and the Constitutional protection then applies.

Henry Cabot Lodge, commenting on this shortsightedness of Mason and his associates, in his *Life of Daniel Webster,* explains it as follows:

"Curiously enough, the theory (impairment of obligation of contract) had been originated many years before, by Wheelock himself, at a time when he expected that the minority of the Trustees would invoke the aid of the Legislature against him, and his idea had been remembered. It was revived at the time of the newspaper con-

troversy, and was pressed upon the attention of the Trustees and upon that of their Counsel. But the lawyers attached little weight to the suggestion, although they introduced it and argued it briefly. Mason, Smith and Webster all relied for success on the ground covered by the first point in Mason's brief. This is called by Mr. Shirley the "Parsons view," from the fact that it was largely drawn from an argument made by Chief Justice Parsons in regard to visitatorial powers at Harvard College. Briefly stated the argument was that the College was an institution founded by private persons for particular uses; that the Charter was given to perpetuate such uses; that misconduct of the Trustees was a question for the courts and that the Legislature, by its interference, transcended its powers. To these general principles, strengthened by particular clauses in the Constitution of New Hampshire, the counsel for the College trusted for victory. The theory of impairing the obligation of contracts they introduced, but they did not insist on it, or hope for much from it. . ."

Sullivan and Bartlett made an able presentation of the defendant's cause. In essence, they argued that the "Reform" acts did not destroy the old corporation and establish a new one but rather enlarged on the old corporation's powers. The old Trustees were not denied the right to exercise the powers and privileges granted them under the old Charter. It was within the scope of Legislative authority to increase the number of Trustees, just as the Legislature could increase the number of judges of a court. They also stressed that Dartmouth College was a public corporation. Therefore its property served a public purpose and hence was subject to the control of the Legislature which represented the public. If public corporations such as Dartmouth were not subject to Legislative control, why then neither were other public corporations, such as towns and countries. With reference to Mason's third point, they denied that the elements of a contract existed, and even granting the existence of a contract, it was one between the state and itself.

Webster's closing plea was not recorded by Farrar, and therefore the points he stressed are unknown. It is be-

lieved, however, that he reiterated those of Mason and Smith. His speech was remembered, however, by those who heard him, for its eloquence and emotional appeal.

Although the dynamic forensic display of the College's counsel greatly impressed its supporters, Webster was not so enthusiastic. He cautioned President Brown: "It would be a queer thing if Governor P's court should refuse to execute his laws." Not that he suggested the court would not decide the case on the merits, but he recognized the political orientation of the judges, and in a case in which the court could go either way legally, he was sophisticated enough to assume that this Republican orientation would be significant.

On November 6, 1817, Chief Justice Richardson delivered the opinion for the Superior Court of Appeals. To the consternation of the old Trustees and their friends, the court unanimously decided for the defendant. John Lord, in his *History of Dartmouth College,* observes that "although Judge Woodbury joined in the decision, it would appear from the dockets that he did not sit in the case, as would, indeed be expected, since he had been himself one of the first Trustees of the University and very active in its behalf."

Richardson's opinion was highly commended. Chancellor Kent praised it profusely and even Webster felt obliged to state that even though it was incorrect, it was "able, ingenious and plausible." It strongly reflected Jeffersonian Republican principles. Charles Haines in his book, *The Role of the Supreme Court in American Government and Politics,* believes "It is one of the strongest statements in our legal literature in support of the public control of educational institutions. The States of the South and of the Middle West," he adds, "carried into effect Chief Justice Richardson's doctrine in the establishment of educational corporations which have become large and well supported state universities. Encouragement was given to the movement to establish state universities through Thomas Jefferson's aid and assistance in the establishment of the University of Virginia."

Richardson was so impressed by the erudition and

brilliance of Counsel that he was moved to comment: "This cause has been argued on both sides with uncommon learning and ability, and we have witnessed with pleasure and with pride a display of talents and eloquence upon this occasion in the highest degree honourable to the profession of law in this state."

Then, after looking into the nature of corporations, he stated, "Public corporations are those which are created for public purposes and whose property is devoted to the objects for which they are created. The corporators have no private beneficial interest either in their franchises or their property. . . . A corporation, all of whose franchises are exercised for public purposes, is a public corporation. . . A gift to a corporation created for public purposes is in reality a gift to the public."

Richardson analyzed the charter of Dartmouth College and found that it was created for the purpose of "spreading the knowledge of the great Redeemer" among the savages and of furnishing "the best means of education" to the province of New Hampshire. "These great purposes are surely, if anything can be, matters of public concern. Who has any private interest either in the objects or the property of this institution? . . . If all the property of the institution were destroyed, the loss would be exclusively public and no loss to the (trustees)."

Hence "the office of Trustee of Dartmouth College is, in fact, a public Trust, as much so as the office of Governor, or of Judge of this Court; and for any breach of Trust, the State has an unquestionable right, through its Courts of Justice, to call them to an account." Richardson therefore deemed it "unnecessary to decide in this case, how far the legislature possesses a constitutional right to interfere in the concerns of private corporations." Continuing, he held, "All public interests are proper objects of legislation; and it is peculiarly the province of the legislature, to determine by what laws those interests shall be regulated."

Richardson then asked, "Do these acts unconstitutionally infringe any private rights of these trustees?" The

paintiffs claimed that the acts in fact, attempted to dissolve the old corporation to the new, and were therefore void. But Richardson replied, "Admitting this to be the attempt, we might with great propriety remark, in the language of *Ashurst, J.* in the case of *The King vs. Pasmore,* 3 D & E 244 that "The members of the old body, have no injury or injustice to complain of, for they are all included in the new charter of incorporation, and if any of them do not become members of the new incorporatiion, but refuse to accept, it is their own fault'."

Richarson noted that the plaintiffs did not make a material distinction "between the rights and faculties relating to corporations, which can exist only in the corporators, as natural persons, and the corporate rights and faculties, which can exist only in the corporation. The right to the beneficial interest in the corporate property, can only exist in natural persons. But the legal title and ownership in corporate property, can in no case be considered as vested in the several corporators, as natural persons, either jointly or severally, but collectively in all, as one body politic, made capable by the policy of the law, of holding property as an individual. This artificial individual, which is said to be immortal, holds in all cases the legal title. . . . But the natural persons who compose this artificial, immortal individual, . . . must in the nature of things, be continually fluctuating and changing. . . It is therefore clear, that the legal identity of a corporation does not depend upon its being composed of the same natural persons, and that an addition of new members to a corporation, cannot in itself, make it a new and different corporation. . . . The addition of new members by a legislative act, even to a private corporation, does not necessarily divest the old corporators of any private beneficial interest, which they may individually have in corporate property."

The court was therefore of the opinion that the acts did not dissolve the old corporation, nor create a new one, nor did they operate to change or transfer any legal title or beneficial interest in the corporate property "but the

legal title remains in the corporation, and the beneficial interest in the public, unaffected."

The plaintiffs had contended that the Acts were in violation of the New Hampshire Constitution in that the right to manage the affairs of the College was a privilege within the meaning of the 15th Article of the New Hampshire Bill of Rights which declared that "no subject shall be arrested, . . . or deprived of his property, immunities or privileges . . . but by . . . the law of the land." Richardson replied: "If we decide that these acts are not the law of the land because they interfere with private rights, all other acts, interfering with private rights, may for aught we see, fall within the same principles; and what statute does not either directly or indirectly interfere with private rights? The principle would probably make our whole statute book a dead letter."

As to Mason's argument that the Dartmouth College Charter of 1769 was a contract, the validity of which was impaired by the Acts, in violation of Article I, Sec. 10 of the U. S. Constitution, Richardson observed that he could find no precedent for this proposition. *Fletcher v. Peck,* 6 Cranch 87 and *New Jersey v. Wilson,* 7 Cranch 164, cited by Mason were not in point, he held. In *Fletcher v. Peck,* there was an express contract, a conveyance of land; in *New Jersey v. Wilson,* there was also an express contract, a treaty, by which lands with a tax exempt privilege were granted to individuals.

The impairment of obligation clause, he maintained, was intended to protect private rights of property and "embraces all contracts relating to private property, whether executed or executory. . ." The word "contracts," however, must be taken in its common acceptance, "as an actual agreement between parties, by which something is granted . . . immediately for the benefit of the actual parties." But this clause "was not intended to limit the power of the states, in relation to their own public officers and servants, or to their civil institutions. . . Thus, marriage is a contract, but being a mere matter of civil institution, is not within the meaning of this clause." Similarly, divorce

laws do not violate the constitutional clause on impairment of the obligation of contract.

Richardson therefore concluded, "If the Charter of a public institution, like that of Dartmouth College, is to be construed as a contract, within the intent of the Constitution of the United States, it will, in our opinion, be difficult to say what powers, in relation to their public institutions, if any are left to the states. It is a construction, in our view, repugnant to the very principles of all government, because it places all the public institutions of all states beyond legislative control. . . . We are therefore clearly of opinion, that the Charter of Dartmouth College is not a contract, within the meaning of this clause in the Constitution of the United States."

Richardson's final emotional appeal in defense of state control over the trustees of educational institutions deserves reading. "No man prizes more highly than I do, the literary institutions of our country, or would go farther to maintain their just rights and privileges. But I cannot bring myself to believe, that, it would be consistent with sound policy, or ultimately with the true interests of literature itself, to place the great public institutions, in which all the young men, destined for the liberal professions are to be educated, within the absolute control of a few individuals, and out of the control of the Sovereign power—not consistent with sound policy, because it is a matter of too great a moment, too intimately connected with the public welfare and prosperity, to be thus entrusted in the hands of a few. The education of the rising generation is a matter of the highest public concern, and is worthy of the best attention of every legislature . . . as a public trust."

Finally, Richardson threw down the gauntlet to the friends of the College. "If the plaintiffs think themselves aggrieved by our decision," he challenged, "they can carry the cause to another tribunal where it can be re-examined. . ."

And that was exactly what the old Trustees decided to do! Undaunted, they made immediate plans to appeal to the Supreme Court of the United States by writ of error.

The Trustees urged Mason, Smith and Webster to represent them on the appeal. Mason and Smith, however, were so involved with other legal commitments that they regretfully had to decline. Webster agreed to carry the case, and suggested that he would do so for a fee of $1,000. He explained to President Brown that he would like to engage Joseph Hopkinson as associate counsel and divide the feel equally with him.

Joseph Hopkinson, who had written the popular, patriotic song, "Hail Columbia" in 1798, was a leader of the Philadelphia Bar and a Federalist member of Congress. During the impeachment trial of Justice Chase, he had distinguished himself by his brilliant defense of the Supreme Court Justice. The Trustees were highly pleased by the choice and authorized Webster to proceed.

On the other hand, the Overseers of the University, were so jubilant over Richardson's opinion, that they evidenced little concern about the appeal. After all, Webster was still a comparative unknown, and had not yet achieved his reputation as "The Expounder of the Constitution" and as a famous statesman-orator. The opinion of Judge Richardson was unimpeachable. Therefore, why spend money needlessly in retaining leading Counsel?

They dropped Sullivan and Bartlett and engaged instead John Holmes, a Congressman from Maine, and William Wirt, Attorney-General of the United States. Woodward believed Holmes to be "extremely ready, of sound mind and a good lawyer, inferior to D. W. only in point of oratory." Holmes was a Republican politician, noted for his bombastic "stump-speaking" and unrefined taste. Wirt was a brilliant lawyer from Virginia who had been appointed Attorney-General in 1818. Unfortunately, he was so involved in becoming familiar with the cases in his office, he had little time to prepare for the argument. He described himself as "estremely fatigued."

Webster and Hopkinson seriously prepared to argue the appeal. On November 27, 1817. Webster wrote to Mason: "I should like to know something of the Court's opinion; I wish you or Mr. Farrar could get a copy for me. If I

go to Washington, and have this cause on my shoulders, I must have your brief, which I should get of course without difficulty, and Judge Smith's . . . Will you inform me whether a copy of Judge Richardson's opinion can be had, and whether you can devise a mode in which I can get Judge Smith's minutes if I should go to Washington."

Webster's main concern was arriving at a theory on which to bring the appeal by writ of error. One of the strongest points he could attack was Richardson's holding that the legislature had not enacted laws violative of the New Hampshire Constitution in "reforming" the Charter of Dartmouth College. But this he could not do, as the Supreme Court lacked jurisdiction to review state laws alleged to be in contravention to a state constitution.

Webster's primary ground of appeal therefore, had to lie on what he and his former associates, Mason and Smith, believed to be the weakest part of their case—that the College Charter was a contract subject to the protection of Section 10, Article I, of the Constitution of the United States, prohibiting states from passing laws impairing the obligation of contracts. This at least was a constitutional ground upon which the appeal could be based. But was it tenable? Was a corporate charter a contract?

The proposition had never been considered by the Supreme Court before. Anticipating a doubtful reaction from the Court, Webster decided to introduce it incidentally and merely by way of elucidation. He would have to suggest to the Justices that, even though the Court's jurisdiction was limited to the "single question, whether these acts are repugnant to the Constitution of the United States," to assist them in forming an opinion on their "true nature and character," the Court should compare them with "those fundamental principles introduced into state governments for the purpose of limiting the exercise of the legislative power, and which the Constitution of New Hampshire expressed with great fullness and accuracy."

Webster had reason for taking this position as Chief

Justice Marshall had referred to principles of justice found in all free governments in deciding *Fletcher v. Peck* in 1810, and Webster shrewdly prepared to capitalize on Marshall's predilection for natural law. Incidentally, it would be interesting to speculate whether the Dartmouth College Case would have become such a great landmark decision, if the Supreme Court had had the opportunity to consider the other points brought out in the briefs of Mason and Smith at Exeter.

The Dartmouth College Case presents many paradoxes—but none so enigmatic as the failure of the erudite and brilliant lawyers who argued the College's cause before the Supreme Court of the U.S. to realize the significance of the great constitutional point involved. Actually—it was a measure of desperation which forced Daniel Webster to introduce the impairment of obligation of contract theory into his brief. And the more Webster brooded over it, the less confident he felt about its soundness.

It was based, he believed, on too narrow a point. If all the aspects of the case could be called to the attention of the Court, he had a much better chance of winning. He therefore suggested that other actions be instituted immediately by the old Trustees in the federal circuit court in order to broaden the base of the appeal.

He voice this concern in a letter to Judge Smith, dated December 8, 1817: "It is our misfortune that our case goes to Washington on a single point. I wish we had it in such shape as to raise all the other objections, as well as the repugnancy of these acts to the Constitution of the United States. I have been thinking whether it would not be advisable to bring suit, if we can get such parties as will give jurisdiction in the Circuit Court of New Hampshire. I have thought of this the more, from hearing of sundry sayings of a great personage. Suppose the corporation of Dartmouth College should lease to some man of Vermont (e.g., C. Marsh) one of their New Hampshire farms, and that the lessee should bring ejectment for it. Or suppose the Trustees of Dartmouth College should

bring ejectment in the Circuit Court for some of the Wheelock lands. In either of these modes the whole question might get before the Court at Washington."

Webster was so disturbed by the weakness of his constitutional argument that he actually wrote two additional letters the same day in which he voiced his increasing doubts.

To Jeremiah Mason he apologized: "I am sorry our college case goes to Washington on one point only. What do you think of an action in some court of the United States that shall raise all the objections to the act in question? Such a suit could easily be brought, that is jurisdiction could easily be given to the Court of the United States by bringing in a Vermont party."

And to President Brown and Charles Marsh he suggested: "You are aware that in the college cause, the only question that can be argued at Washington, is whether the recent acts of the legislature of New Hampshire do not violate the Constitution of the United States. This point, though we trust a strong one, is not perhaps stronger than that derived from the character of these acts, compared with the Constitution of New Hampshire. It has occurred to me whether it would not be well to bring an action, which should present both and all our points to the Supreme Court. This could be done by bringing the action originally in the Circuit Court."

Thus urged, three such supplementary suits were later brought by the College Trustees in the Federal Circuit Court at Portsmouth so that they could be appealed expeditiously to the Supreme Court in the event the original appeal resulted in an unsuccessful outcome.

Commenting on this strategy of Webster, Henry Cabot Lodge notes: "The popular opinion of this case seems to be that Mr. Webster, with the aid of Mr. Mason and Judge Smith, developed a great constitutional argument, which he forced upon the acceptance of the court by the power of his close and logical reasoning, and thus established an interpretation of the Constitution of vast moment. The truth is, that the suggestion of the Constitu-

tional point, not a very remarkable idea in itself, originated, as has been said, with a layman, was regarded by Mr. Webster as a forlorn hope, and was very briefly discussed by him before the Supreme Court. He knew of course that if the case was to be decided against Woodward, it could only be on the Constitutional point, but he evidently thought that the Court would not take the view of it which was favorable to the college."

Yet, Webster did have cause to doubt the effectiveness of his sole constituional point. He was familiar with the background of Section Ten of Article I. He knew that it had been framed primarily in order to prevent the states from passing laws relieving debtors of their obligation to pay their lawful debts. Chief Justice Hughes aptly noted the reasons for the adoption of the clause in *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398, 431 (1934), when he wrote: "The widespread distress following the Revolutionary period and the plight of debtors, had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened. . ."

In a sense Webster's reasoning reflected the thought later expressed by Judge Swayne in *Edwards v. Kearzey,* 96 U.S. 595 (1878): "The point decided in *Dartmouth College v. Woodward* had not, it is believed, when the Constitution was adopted, occurred to any one. There is no trace of it in the *Federalist* or in any other contemporaneous publication. It was first made and judicially decided under the Constitution in that case. Its novelty was admitted by Chief Justice Marshall."

Then again, although the Supreme Court had construed the clause in some cases, it had never actually decided that a corporate Charter was a contract. In *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810), Marshall had extended the protection of the clause to the public grants of land involved in the infamous Yazoo Land Fraud, in order

to offset the narrow construction given to the prohibition against *ex post facto* laws in *Calder v. Bull,* 3 U.S. (3 Dall.) 386 (1798). In *New Jersey v. Wilson,* 11 U.S. (7 Cranch) 164 (1812), for similar reasons, corporate exemptions from taxation were also included under the Clause.

Yet these cases had been rejected by Judge Richardson as not pertinent to the issues involved in the College Case; he had flatly denied that a corporate charter was a contract. The uniqueness of the point therefore rightfully disturbed Webster as a constitutional lawyer.

Webster meticulously prepared for the argument. He completely mastered the briefs of Mason and Smith, and when on the fateful day of March 10, 1818, the case was called for argument before the Supreme Court he was ready to make one of the greatest efforts of his career.

Webster was then comparatively unknown. He was still only 36 years old. He had retired from political life and was developing his legal practice in Boston. Those who knew him however were aware of his dynamic personality and effectiveness in debate and much was expected of him by the College supporters.

At 11:00 a.m. Dartmouth College v. Woodward was the first case called for argument. The Court then sat from 11:00 a.m. to 4:00 p.m. when it adjourned. It is interesting to note that although the case attracted very little attention at the time, no other argument in the history of the Court has ever been so dramatically and exhaustively described. The Supreme Court then met in a "mean apartment of moderate size" in the North Wing of the Capitol. It may be recalled that its former quarters had been destroyed during the fire of 1814. Memory plays strange tricks even in the minds of the greatest intellects. Justice Joseph Story, who was a member of the Court, recalled twelve years later that "a large assemblage of ladies, of eminent lawyers, and of distinguished statesmen, filled the Court Room." Yet Chauncey Goodrich who was present during the argument noted that the audience was "small, consisting chiefly of legal men." Webster himself commented that a "small and unsympathetic" group

heard him speak. But George Ticknor described the Court Room as "excessively crowded, not only with a large assemblage of the eminent lawyers of the Union, but with many of its leading statesmen."

All the Judges were present. Fuess describes them well: "In the center, dominating his associates, was the great Chief Justice, John Marshall, whose luminous intellect and sane judgment did so much to determined the course of our national history—a lovable personality, tall, ungainly, careless in dress and awkward in gesture combining simplicity of manner with dignity of bearing. Long after Federalism had persisted as a political force, he resolutely upheld its doctrines from his throne of power. The other members included Bushrod Washington,—'a little, sharp-faced gentleman, with only one eye, and a profusion of snuff distributed over his face,'—who had been appointed in 1798 and was the favorite nephew of President Washington; William Johnson of South Carolina, who had taken his seat on the bench in 1804, when he was only thirty-three years old—'a large, athletic, well-built man . . . with a full ruddy and fair countenance, with thin white hair, and partially bald,' Henry Brockholst Livingston, of an old New York family, with his 'fine Roman face, acquiline nose, high forehead, bald head, and projecting chin' . . . Thomas Todd, of Kentucky, 'a dark-complexioned, good-looking, substantial man'; Gabriel Duval, of Maryland, 'his head as white as a snowbank, with a long white cue hanging down to his waist'; and Joseph Story, of Massachusetts, appointed with Duval in 1811—'below middle-size, of light, airy form, rapid and sprightly in his motions, and polished and courtly in his manners.' Two only were avowed Federalists—Marshall and Washington. Of the remaining five, three had been selected by Jefferson and two by Madison."

Webster opened the case for the College. His speech was indeed remarkable. He spoke extemporaneously for almost five hours, practically the whole of one sitting of the Court. Webster made his point clearly, forcibly and impressively. The Court and all who heard him appeared

to be entranced by the force of his reasoning, and the power of his eloquence. In essence he repeated the arguments Mason and Smith had declaimed before the New Hampshire Court, but in his own characteristic style and with some revision.

"The general question is," he maintained, "whether the acts of the legislature of New Hampshire, of the 27th of June, and of the 18th and 26th of December, are valid and binding on the plaintiffs, without their acceptance or assent. The Charter of 1769 created and established a corporation, to consist of twelve persons, and no more; to be called the 'Trustees of Dartmouth College. . .'

"After the institution thus created and constituted had existed uninterruptedly and usefully, nearly fifty years, the legislature of New Hampshire passed the acts in question.

"The first act makes the twelve trustees under the charter, and nine other individuals, to be appointed by the Governor and Council a corporation, by a new name; and to this new corporation, transfers all the property, rights, powers, liberties and privileges of the old corporation: with further power to apply all or any part of the funds to these purposes; subject to the power and control of a board to twenty-five overseers, to be appointed by the Governor and Council.

"The second act makes further provisions for executing the objects of the first, and the last act authorizes the defendant, the Treasurer of the Plaintiffs, to retain and hold their property, against their will.

"If these acts are valid, the old corporation is abolished, and a new one created. . . . If it could be contended that the effect of these acts was not entirely to abolish the old corporation, yet it is manifest that they impair and invade the rights, property and powers of the trustees under the charter as a corporation, and the legal rights, privileges and immunities which belong to them, as individual members of the corporation. . . These acts alter the whole constitution of the corporation. . . They revoke corporate powers and franchises. They alienate and

transfer the property of the College to others. . . The college is turned into a university. Power is given to create new colleges. . .

"If the legislature can at pleasure make these alterations and changes in the rights and privileges of the plaintiff, it may with equal propriety, abolish these rights and privileges altogether.

"It will be contended by the plaintiffs, that these acts are not valid and binding upon them without their assent

1) Because they are against common right and the Constitution of New Hampshire

2) Because they are repugnant to the Constitution of the U.S. . . ."

Obviously only the second point was validly before the Supreme Court but Webster was so impressed by the need to consider the first point that he devoted the greater part of his argument to it. Why the Court permitted him to do so, is not known to this day—but the Judges could have been so fascinated by Webster's brilliant oratory that they allowed him to continue uninterruptedly.

"Corporate franchises can only be forfeited by trial and judgment," he continued. "In case of a new charter or grant to an existing corporation, it may accept or reject it as it pleases. It cannot be pretended that the legislature as successor to the King in this part of his prerogative, has any power to revoke, vacate or alter this charter. . .

"The legislative power is limited," he insisted, "and the rights and property of the citizens are protected by the prohibition 'that no person shall be deprived of his property, immunities or privileges, put out of the protection of the law, or deprived of his life, liberty, or estate but by judgment of his peers or the law of the land.' "

Noting that Judge Richardson in his opinion below denied that the trustees under the charter had any property, immunity, liberty or privilege in the corporation, within the meaning of the prohibition in the New Hampshire Bill of Rights, and that it was a public corporation and public property in which the trustees had no greater

interest than any other individuals and that therefore their office was a public trust like that of the Governor or a judge subject to the control of the legislature, he objected:

"The corporation in question is not a civil, although it is a lay corporation. It is an eleemosynary corporation . . . Eleemosynary corporations are private bodies . . . They had therefore . . . privileges, property and immunities . . . which they can assert against the legislative, as well as against other wrongdoers."

Summing up on this point, he disclaimed with fervor:

"If the view which has been taken of this question be at all correct, this was an eleemosynary corporation, a private charity. The property was private property. The trustees were visitors and the right to hold the charter, administer the funds. and visit and govern the college, was a franchise and a privilege, solemnly granted to them. The use being public, in no way diminished their legal estate in the property, or their title to the franchise. There is no principle, nor any case, which declares that a gift to such a corporation is a gift to the public. The acts in question violate property. They take away privileges, immunities, and franchises. They deny to the trustees the protection of the law, and they are retrospective in their operation. In all which respects they are against the Constitution of New Hampshire."

Webster also disagreed with Judge Richardson that the acts of the legislature were not in violation of the "law of the land" clause of the New Hampshire Constitution. Webster maintained that the "law of the land" implies general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. Thus every citizen holds his life, liberty, property and immunities under the protection of the general rules which govern society. Then citing with approval Justice Chase in *Calder v. Bull,* Webster, in the opinion of a great constitutional lawyer, Thomas M. Cooley, expounded one of the best definitions of "due process of law":

"Everything which may pass under the form of

enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions, of the highest importance, completely inoperative and void. It would tend directly to establish the union of all powers in the legislature."

Charles Haines, another constitutional expert notes that this definition "has frequently been considered as authority for the doctrine that acts not legislative in nature are, in accordance with the separation of powers theory and the due process of law provision, necessarily void."

Webster devoted most of his argument to the basic justice of his cause and to the principle that private property must be protected from confiscation. As he approached the end of his speech Webster belatedly turned to what he considered his weakest point—that the legislative acts were repugnant as well to Section 10, Article I of the Constitution of the U.S. which reads: "No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

Encouraged by the effect he had made on the bench with his oratorical brilliance, he boldly asserted that under the authority of *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810) and *Terret v. Tyler,* 13 U.S. (9 Cranch) 43 (1815),

"A grant is a contract, within the meaning of (Sect. 10, Art. I) and a grant by a State is also a contract, as much as the grant of an individual. . .", and because charters of incorporation are of the nature of contracts, they cannot be altered and varied but by the consent of the original parties. "It is therefore contended . . . that the charter of 1769 (to Dartmouth College) is a contract, a stipulation or agreement, mutual in its considerations, express and formal in its terms, and of a most binding and solemn nature. . . . The acts in question repeal and abro-

gate its most essential parts. . ." And thus the constitutional violation followed.

Webster in conclusion emphasized that the case before the Court was not of ordinary importance, nor of everyday occurrence. "It affects not this College only but every college, and all the literary institutions of the country. . . . It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions. If the franchise may be at any time taken away, or impaired, the property may also be taken away, or its use perverted. Benefactors will have no certainty of effecting the object of their bounty, and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their offices. Colleges and halls will be deserted by all better spirits, and become a theatre for the contentions of politics. Party and faction will be cherished in the places consecrated to piety and learning. These consequences are neither remote nor possible only. They are certain and immediate."

There is one part of Webster's address, which was not reported either in his printed brief nor in Farrar's Report of the case which has created an intriguing controversy. Even Webster admitted that "something was left out" of the Report. Henry Cabot Lodge in his Life of Webster suggests an unusual feature of Webster's argument which casts it in an entirely different light.

" 'Something was left out', Mr. Webster says, and that something which must have occupied in its delivery nearly an hour was the most conspicuous example of the generalship by which Mr. Webster achieved victory, and which was wholly apart from his law. The art of management had already been displayed in the treatment of the cases made up for the Circuit Courts, and in the elaborate and irrelevant legal discussion which Mr. Webster introduced before the Supreme Court. But this management now entered on a much higher stage, where it was destined to win victory, and exhibited in a high degree tact and knowledge of men. Mr. Webster was fully aware that

he could rely, in any aspect of the case, upon the sympathy of Marshall and Washington. He was equally certain of the unyielding opposition of Duval and Todd: The other three judges, Johnson, Livingston, and Story, were known to be adverse to the College, but were possible converts. The first point was to increase the sympathy of the Chief Justice to an eager and even passionate support. Mr. Webster knew the chord to strike, and he touched it with a master hand. This was the 'something left out', of which we know the general drift, and we can easily imagine the effect. In the midst of all the legal and constitutional arguments, relevant and irrelevant, even in the pathetic appeal which he used so well in behalf of his Alma Mater, Mr. Webster boldly yet skilfully introduced the political view of the case. So delicately did he do it, that an attentive listener did not realize that he was straying from the field of 'mere reason' into that of political passion. Here no man could equal him or help him, for here his eloquence had full scope, and on this he relied to arouse Marshall, whom he thoroughly understood. In occasional sentences he pictured his beloved college under the wise rule of Federalists and of the Church. He depicted the party assault that was made upon her. He showed the citadel of learning threatened with unholy invasion and falling helplessly into the hands of Jacobins and free-thinkers. As the tide of his resistless and solemn eloquence, mingled with his masterly argument, flowed on, we can imagine how the great Chief Justice roused like an old war-horse at the sound of the trumpet. The words of the speaker carried him back to the early years of the century when, in the full flush of manhood, at the head of his Court, the last stronghold of Federalism, the last bulwork of sound government, he had faced the power of the triumphant Democrats. Once more it was Marshall against Jefferson—the Judge against the President. Then he had preserved the ark of the Constitution. Then he had seen the angry waves of popular feeling breaking vainly at his feet. Now in his old age, the conflict was revived. Jacobinism was raising its sacrilegious hand against the Temples of learning, against the friends of order and good

government. The joy of battle must have glowed once more in the old man's breast as he grasped anew his weapons and prepared with all the force of his indomitable will to raise yet another constitutional barrier across the path of his ancient enemies.

"We cannot but feel that Mr. Webster's lost passages, embodying this political appeal, did the work, and that the result was settled when the political passions of the Chief Justice were fairly aroused. Marshall would probably have brought about the decision by the sole force of his imperious will. But Mr. Webster did a good deal of effective work after the arguments were all finished and no account of the case would be complete, without a glance at the famous peroration with which he concluded his speech and in which he boldly flung aside all vestige of legal reasoning, and spoke directly to the passions and emotions of his hearers."

Lodge has been criticized for implying that the "political appeal" thrust of Webster's argument conveniently "left out" of the printed report of his speech, unduly influenced the Court. He is accused of uncritically accepting the assumption to this effect of John Shirley (in his comprehensive but highly partisan and poorly arranged work, *The Dartmouth College Causes & the Supreme Court of the U.S.*, published in 1879) based on innuendo and conjecture. Shirley's evidence to bear this out is considered incomplete and unreliable and Lodge was led astray by Shirley. Fuess strongly protests that if Webster had actually done what Shirley and Lodge accused him of, "it would have been a gross breach of judicial decorum, which would rightly have been resented by the Republican members of the bench." Beveridge adds Marshall himself would have resented it. "Moreover, Marshall needed no such persuasion, nor, indeed, persuasion of any kind. His former opinions showed where he stood. . . The something "left out" of Webster's reported argument was, of course, his extemporaneous and emotional peroration described by Goodrich."

Seated in the audience during Webster's argument was Chauncey A. Goodrich, a professor of oratory at Yale,

who had been sent to Washington to report the thrust and effect of the Dartmouth College Case to the Yale authorities. Yale administrators realized that the Court's decision would probably affect Yale as well, and they were highly concerned by its implications. Goodrich was so overwhelmed by Webster's final plea that he immediately wrote down his impressions of it. Later, in 1853, Rufus Choate wove it into a famous passage which he delivered in a eulogy on Webster. It has been suggested that Choate, a brilliant orator himself, may have colored it with his own vivid and romantic imagination. Be that as it may—it is one of the most fascinating descriptions of a Supreme Court argument in the history of that Court and reflects the tremendous effect Webster made.

When Webster rose to address the Supreme Court on behalf of his beloved Alma Mater, he was prepared to make the supreme effort of his career. His audience sat entranced throughout his oratorical display. When he came to his peroration however, not even they were prepared for the brilliant tour de force that followed.

"Mr. Webster entered upon his argument in the calm tone of easy and dignified conversation. His matter was so completely at his command that he scarcely looked at his brief, but went on for more than four hours with a statement so luminous, and a chain of reasoning so easy to be understood, and yet approaching so nearly to absolute demonstration, that he seemed to carry with him every man of his audience, without the slightest effort or uneasiness on either side. It was hardly *eloquence*, in the strict sense of the term: it was pure reason. Now and then for a sentence or two his eye flashed and his voice swelled into a bolder note, as he uttered some emphatic thought, but he instantly fell back into the tone of earnest conversation, which ran throughout the great body of his speech. A single circumstance will show the clearness and absorbing power of his argument. I observed Judge Story sit, pen in hand, as if to take notes. Hour after hour I saw him fixed in the same attitude, but I could not discover that he made a single note. The argument ended, Mr. Webster

stood for some moments silent before the Court while every eye was fixed intently upon him. At length, addressing Chief Justice Marshall, he said,——

"'*This, Sir, is my case.* It is the case, not merely of that humble institution, it is the case of every college in our land. It is the case of every eleemosynary institution through our country, of all those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of human life. It is more. It is, in some sense, the case of every man who has property of which he may be stripped,—for the question is simply this: Shall our state legislature be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their discretion, shall see fit? Sir, you may destroy this little institution: it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out: but if you do, you must carry through your work! You must extinguish, one after another all those great lights of science, which for more than a century, have thrown their radiance over the land! It is, Sir, as I have said, a small college, and yet *there are* those that love it. . . .'"

"Here the feelings which he had thus far succeeded in keeping down, broke forth. His lips quivered; his firm cheeks trembled with emotion; his eyes were filled with tears; his voice choked, and he seemed struggling to the utmost simply to gain the mastery over himself which might save him from an unmanly burst of feeling. I will not attempt to give you the few broken words of tenderness in which he went on to speak of his attachment to the College. The whole seemed to be mingled with the recollections of father, mother, brother, and all privations through which he had made his way in life. Every one saw that it was wholly unpremeditated;—a pressure on his heart which sought relief in words and tears.

"The court-room during these two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall, gaunt figure bent over as if to catch

the slightest whisper, the deep furrows of his cheek expanded with emotion, and eyes suffused with tears; Mr. Justice Washington at his side, with his small emaciated frame, and countenance more like marble than I ever saw on any other human being, leaning forward with an eager troubled look; and the remainder of the Court at the two extremities pressing, as it were, toward a single point, while the audience below were wrapping themselves round in closed folds beneath the bench to catch each look, and every movement of the speaker's face. If a painter could give us the scene on canvass—those forms and countenances and Daniel Webster as he then stood in the midst—it would be one of the touching pictures in the history of eloquence. One thing it taught me, that the pathetic depends not merely on the words uttered, but still more on the estimate we put on him who utters them. There was not one among the strong-minded men of that assembly who could think it unmanly to weep, when he saw standing before him the man who had made such an argument melted into the tenderness of a child.

"Mr. Webster having recovered his composure, and fixing his keen eye on the Chief Justice, said, in that deep tone with which he sometimes thrilled the heart of an audience,—

" 'Sir, I know not how others may feel (glancing at the opponents of the College before him, some of whom were its graduates), but for myself, when I see my Alma Mater surrounded, like Caesar, in the senate house by those who are reiterating stab upon stab, I would not for this right hand, have her turn to me and say—*et tu quoque mi fili!*—and thou too, my son!' "

"He sat down: There was a death-like stillness throughout the room for some moments: every one seemed to be slowly recovering himself, and coming gradually back to his ordinary range of thought and feeling.

Although Webster had spoken for almost five hours, his argument was one of the shortest ever recorded to that date in a case of great public importance. For example, Luther Martin spoke for three days alone when he argued *McCulloch vs. Maryland* before the Supreme Court.

If ever a lawyer were put in a misfortunate position it was John Holmes, who rose to answer Webster on behalf of the University. Holmes was a Congressman from Massachusetts, described by Beveridge as "a busy, agile, talkative politician, a 'power-on-the-stump' orator, gifted with cheap wit and tawdry eloquence." After Webster's highly emotional appeal which had dissolved the court into breathless silence, Holmes' contribution by comparison was pathetic. Using the tricks of a stump-orator, he left the Court cold with his argument that the prohibition in the Constitution of the United States which alone gave the Court jurisdiction in the case, did not extend to grants of political power; to contracts concerning the internal government and police of a sovereign state. Nor did it extend to contracts which related merely to matters of civil institutions, even of a private nature. He continued—the education of youth and the encouragement of the arts and sciences was on of the most important objects of civil government. "By our Constitution, it is left exclusively to the states, with the exception of copyrights and patents." The Dartmouth Charter was not such a contract as was contemplated by the Constitution of the United States. It was not a contract of a private nature, concerning property or other private interests, but rather it was a grant of a public nature, for public purposes, relative to the internal government and police of a state, and therefore liable to be revoked or modified by the supreme power of that state. He also stressed that where a private proprietary interest is coupled with the exercise of political power, or a public trust, the charters of corporations had frequently been amended by legislative authority.

Webster rejoiced over the "folly" Holmes "uttered." He wrote to Jeremiah Mason, "Upon the whole he gave us three hours of the merest stuff that was ever uttered in a county court." Judge Bell of the New Hampshire Supreme Court was so disturbed by Holmes' cheap tricks and weak mouthing of the points made by Judge Richardson, that he left the courtroom disgustedly in the midst of Holmes' argument.

William Wirt, who was associated with Holmes on the

appeal, then arose to undo the harm of Holmes' fumbling. Wirt was a highly competent lawyer, even brilliant on occasion. He had just been appointed Attorney General of the United States, however, and was so overwhelmed with the task of reorganizing that office, he had little time to devote to the preparation of his argument. Between February 2 and March 11, he had actually argued six cases in the Supreme Court. Writing to a friend, he complained shortly before the Darthmouth College Case was to be heard: "It is late at night—the fag-end of a hard day's work. My eyes, hand and mind all tired. . . . I have been up till midnight, at work, every night, and still have my hands full. . . . I am now worn out . . . . extremely fatigued. . . . The Supreme Court is approaching. It will half kill you to hear that it will find me unprepared."

Wirt did not help the University's cause much—actually breaking down in the middle of his argument and begging the Court for permission to continue the next day. This happened when he introduced into his argument the fact that the King had founded Darthmouth College and it was called to his attention that the Charter specifically stated Eleanor Wheelock was its founder. He even apologized to the Court for being so ill-prepared because he had had too little time to study the case. Wirt, too, slavishly followed the reasoning of Judge Richardson's opinion below, which of course, had already been submitted to the Court. Wirting to Mason, Webster commented that Wirt was "a good deal of a lawyer, and has very quick perceptions, and handsome power of argument; but he seemed to treat this case as if his side could furnish nothing but declamation." Webster later wrote to Judge Smith that Wirt "said more nonsensical things than became him." For the record, however, Webster complimented Wirt on his argument, telling him that it was "a full, able, and most eloquent exposition of the right of the Defendant."

Joseph Hopkinson closed for the plaintiffs. The author of "Hail Columbia," a leader of the Philadelphia bar, he showed according to Beveridge "breeding in every look,

movement, word, and intonation." He spoke in a quiet dignified manner, reflecting scholarship, culture and deep understanding of the law. He was indeed a marked contrast to the bombastic Holmes and the apologetic Wirt. Hopkinson carefully destroyed all the legal arguments of the defendants, insisting that the whole argument of Holmes and Wirt proceeded on the assumption, which was not warranted and could not be maintained, that the corporation created by the Dartmouth College Charter was a public corporation and that its members were public officers and agents of government. He concluded that the Charter had to be regarded as a contract, one protected by the Constitution of the United States, and that the acts of the New Hampshire Legislature impaired this contract.

Webster was pleased with Hopkinson's efforts. He wrote to Jeremiah Mason on March 13, 1818: "Mr. Hopkinson made a most satisfactory reply to the law, and not following Holmes and Wirt into the fields of declamation and fine speaking. . . . I may say that nearly or quite all the Bar are with us. How the Court will be I have no means of knowing." To President Brown, Webster wrote the same day: "Mr. Hopkinson understood every part of our cause, and in his argument did it great cause."

It would appear from contemporary accounts that Webster and Hopkinson made much the better impression than Holmes and Wirt. One observer noted: "In the College cause, Webster shone like the sun, and Holmes like a sun fish." And another—"Holmes went up like a rocket and down like a stick."

After the conclusion of his argument Hopkinson asked the Court "whether it was probable a decision would be made at this term."

Marshall replied "The Court would pay to the subject the consideration due to an act of the legislature of a state and a decision of a State Court. It was hardly probable a judgment would be pronounced at this term."

The next morning Marshall announced that inasmuch as the judges were divided in opinion and some had not even formed one, the case would be continued to the next

term. Webster had his own thoughts on how the Court was divided. He wrote to Judge Smith: "I have no accurate knowledge of the manner in which the Judges are divided. The Chief Justice and Washington, I have no doubt are with us. Duval and Todd, perhaps against us; the other three, holding up. I cannot much doubt but that Story will be with us in the end, and I think we have much more than an even chance for one of the others. I think we shall finally succeed."

The adjournment of the case alarmed university circles. The new trustees had been led to believe that their legal position was so strong the court would immediately rule in their favor. In this they had been led to believe by Judge Richardson's apparently infallible opinion below and by the optimistic reports sent back to them by Congressman Salma Hale, one of the trustees, who acted as their observer in Washington. Hale apparently misjudged the effect of the argument before the Court, believing that the University's lawyers had gotten the better of the argument. Hale believed that the chances for success for the University "were as 5 to 2, with an even chance of 6 to 1." But reports began to filter back that Wirt and Holmes had not done so well and the University party began to have second thoughts about their position.

Their alarm increased when they learned that Webster had carefully revised his printed brief and had distributed it to Chancellor James Kent of New York, other influential people and some of the Judges on the Supreme Court. Webster's reason for doing so apparently was to offset the effect of the wide circulation the University trustees had made of Judge Richardson's opinion to probably the same personages.

Webster himself had admitted that Judge Richardson's opinion was "able, ingenious and plausible." He also knew that Chancellor Kent had praised it profusely. It was highly important therefore that the College's position be clearly understood. Moreover he was encouraged to make this distribution by Chief Justice Parker of the Massachusetts Supreme Judicial Court. For,

said Judge Parker interestingly enough: "Public sentiment has a great deal to do in affairs of this sort, and it ought to be well formed. That sentiment may even reach and affect a court. At least if there be any members afraid, it will be a great help to know that all the world expects they will do right."

Webster realized, however, that he was exposing himself to attack by such recourse. Writing to one of the recipients of his argument he cautioned: "A respect for the Court, as well as general decorum, seem to prohibit the publishing of an argument while the cause is pending. I have no objection to your showing this to any professional friend in your discretion. I only wish to guard against it becoming too public."

He later wrote to Justice Story: "I send you five copies of our argument. If you send one of them to each of such of the Judges as you think proper, you will of course do it in the manner least likely to lead to a feeling that any indecorum has been committed by the plaintiffs."

Webster was particularly perturbed by Chancellor Kent's opinion of the case. If he agreed with Judge Richardson—the College's cause was indeed vulnerable. For Chancellor Kent's reputation as a jurist at the time was supreme. He was considered only second to Marshall in the country and probably his equal in learning and ability. His counsel was often sought by other judges, even by the members of the Supreme Court. Livingston and Johnson particularly often sought his advice.

After reading Webster's printed argument, and conferring with President Brown of the College who made a special trip for the purpose, Kent changed his mind. He had read Judge Richardson's opinion hastily and was persuaded of the constitutionality of the New Hampshire legislation affecting Dartmouth College because he was "led by the opinion to assume the fact that Dartmouth College was a public establishment for purposes of a general nature."

It was later reported that Kent's reversal of his original conclusion was due to his holding in 1804 as a

member of the Council of Revision in New York that the charter of the City of New York could not be revised without the consent of the corporation. "Charters of incorporation were not to be essentially affected without due process of law, or without consent of the parties concerned. Nothing but a strong public necessity could justify such an interference."

Kent, however made it clear to President Brown, who was an old friend of his, that he then spoke "as a politician, not as a judge; and he was not clear that the doctrine laid down was correct, as applied to corporations for the purposes of government; etc." But even before the Dartmouth College Case Kent had finally concluded "that charters of information, whether granted for private or local charitable, or literary or religious purposes were not to be affected without due process of law, or without the consent of the parties concerned," as a sound principle of free government.

It is not too clear, but apparently Justices Johnson and Livingston did ask Kent for his opinion on the Dartmouth College Case. Shirley, a commentator on the case, suggests as a matter of fact that Livingston and Johnson were unethically influenced by Kent. Story too was improperly persuaded to change his view by friends of the College, says Shirley. Beveridge, however, contends that these were merely unsubstantiated and unjustified rumors. The University authorities finally realized that the indefatigable effort of the friends of the College could affect the decision, and they had to take immediate and drastic action to salvage their case.

On November 17, 1818, Webster learned of a most disturbing new development in the College case from Hopkinson. "In my passage through Baltimore I fell in with Pinkney" wrote Hopkinson to Webster, "who told me he was engaged in the cause by the present University, and that he is desirous to argue it if the Court will let him. I suppose he expects to do something very extraordinary in it, as he says Mr. Wirt 'was not strong enough for it, has not back enough. . . .' I think if the Court consents

to hear Mr. Pinkney it will be a great stretch of complaisance, and that we should not give our consent to any such proceeding." The thought that William Pinkney, the outstanding leader of the American Bar, would reargue the case alarmed Webster as well. Pinkney was a magnificent advocate, diligent, energetic, and always complete master of any case he argued. On his death in 1822, Judge Story wrote: "His genius and eloquence were so lofty, I might almost say so unrivalled, his learning so extensive, . . . his character at the Bar so fearless and commanding, that there seems now left a dismal and perplexing vacancy."

True to his character, Pinkney began to study the Dartmouth case with vigor and ability. He mastered it completely and made it known that he planned to seek permission to reargue the case at the Court's next term. That he would be highly persuasive, if allowed to do so, was never questioned. Whether he would be permitted to do so was another matter, and both Hopkinson and Webster awaited the next term of Court with deep concern—but confident that they could prevent Pinkney from being heard. Writing to Mason on February 1st, 1819, the first day of the new Term of the Court, Webster assured him: "Wirt and Pinkney still talk of arguing one of the College causes. On our side we smile at their not being able to suppose them serious. I hope they will not attempt it, as it would only lead to embarrassment about the facts. I should have no fears for the results."

February 2, 1819 came. The Court met for its first session according to *Niles Register,* "in the splendid room provided for it in the Capitol." (The Court sat there until 1860. Thereafter it was used as the Supreme Court Library—until the Supreme Court moved to its present quarters.)

In the courtroom sat Pinkney, prepared as Beveridge notes, to make "the supreme effort of his brilliant career." As the Justices entered the room preceded by Chief Justice Marshall, everyone rose, Pinkney conspicuously stepping forward to be noticed. Many friends of the new Uni-

versity were present too, including among them the New Hampshire members of Congress, and everyone eagerly awaited the outcome. Webster and Hopkinson were prepared to meet this counter-stroke. Hopkinson had outlined what should be their strategy in a letter to Webster: "It cannot be expected that we shall repeat our arguments merely to enable Mr. Pinkney to make a speech or that a cause shall be reargued because after the argument has been concluded and the Court has the case under advisement, either party may choose to employ new counsel. If the Court consents to hear Mr. Pinkney, it will be a great stretch of complaisance, and that we should not give our consent to any such proceeding, but if Mr. Pinkney, on his own application, is permitted to speak, we should claim our right of reply. The Court cannot want to have our argument repeated and they will hardly require us to do it for the accommodation of Mr. Pinkney."

Despite it all—however—the result was anticlimactic. Marshall knew exactly what Pinkney intended to do—but he was a master of strategy himself. "Turning his blind eye" upon Pinkney, Marshall blandly announced that the Court had arrived at a decision during its recess on the Dartmouth College case and he immediately proceeded to read his opinion. Frustrated and resigned, Pinkney abjectly sat down. Actually Marshall had written the opinion while he had vacationed during the summer of 1818 and all the members of the Court except Duval and Todd had agreed to it. But this had been such a carefully kept secret, it was unknown to all others.

As Marshall read his opinion, consternation spread among the University's supporters while Webster and Hopkinson incredulously exulted. The College's victory was complete and sweeping. Beginning on page 624 of volume 17 of Wheaton's Reports and ending on page 654, one of the most striking features of this great landmark decision of Marshall, is that he does not cite any case as authority for the propositions of law he enunciates.

The single question before the Court, Marshall held, was whether the acts of the New Hampshire Legislature

"violate the Constitution of the United States." After stating that "this Court can be insensible neither to the magnitude nor delicacy of this question"—Marshall immediately came to the crux of the problem:

"The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a state is to be revised—an opinion which carried with it intrinsic evidence of the diligence, of the ability, and the integrity, with which it was formed. On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that in no doubtful case, would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the Constitution of the United States, that 'no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.' In the same instrument, they have also said, 'That the judicial power shall extend to all cases in law and equity arising under the Constitution.' On the Judges of this Court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control, and, however irksome the task may be, this is a duty from which we dare not shrink."

The question whether a charter was a contract—which was very much in contention—Marshall summarily resolved in a few curt and magisterial sentences, without argument or rationalization: "It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated, that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction every ingredient of a complete and legitimate contract is to be found."

Having disposed of this point, Marshall then asked: "Is this contract protected by the Constitution of the

United States? (and) Is it impaired by the acts under which the defendant holds?"

Although no clause of the Constitution could be construed so as to interfere with legislative control over civil or public corporations, such as towns or counties, and even make divorce laws invalid—still Dartmouth College was a private eleemosynary institution, "endowed with a capacity to take property, for objects unconnected with government, whose funds are bestowed by individuals, on the faith of the charter."

To establish the proposition that Dartmouth College was a private eleemosynary corporation, Marshall questioned whether its objects—education of youth—stamped it as a public institution subject to public control. "That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution, founded by government and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation?" Dr. Wheelock, instructing and sustaining Indians at his own expense and "on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government . . . whence, then can be derived the idea, that Dartmouth College has become a public institution, and its trustees public officers. . . ? Not from the source whence its funds were drawn . . . not from the application of those funds. . . Is it from the act of incorporation?"

Marshall then went on to make his noted definition of a corporation. "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon

it, either expressly, or as incidental to its very existence. . . . Among the most important are immortality, and . . . individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual . . . for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. . . . It is no more a state instrument than a natural person exercising the same powers would be."

Marshall then went on to discard Judge Richardson's decision that Dartmouth College was established as a public corporation. After reviewing the facts of the incorporation of Dartmouth College and the purposes of the donors in giving their property to the College, Marshall found that "Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating . . . the bounty of the donors, to the specified objects of that bounty," that its trustees could perpetuate themselves; that they were not public officers, nor was Dartmouth a "civil institution, participating in the administration of government. . . ."

Marshall admitted that according to the British form of government Parliament was "omnipotent." It could have annulled the charter immediately after it had been granted by the Crown—and the trustees could not have protested legally—despite the perfidy of such an act. "Yet the contract would, at that time, have been deemed sacred by all. What has since occurred, to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now, what it was in 1769."

"This is plainly a contract," Marshall insisted, "to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. . . . It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then, a contract within the letter of the Constitution, and within its spirit also. . . ."

Marshall conceded, "It is more than possible that the

preservation of rights of this description was not particularly in the view of the framers of the Constitution, when the clause under consideration was introduced into that instrument" (a thought that had bothered Mason, Smith and Webster as well). But, as Charles Haines comments in his *Role of the Supreme Court in American Government and Politics,* Marshall adopted the rule of interpretation that every effort must be made to give a meaning to the Constitution favorable to the protection of private rights, when he continued:

"It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievious, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception."

Marshall then found that "there is no expression in the Constitution, no sentiment delivered by its contemporaneous expounders, which would justify "making such an exception." Marshall warned "that no man . . . ever will be the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature."

The framers of the Constitution believed this to be true and hence Marshall concluded that they did not intend "to leave these contracts subject to those interferences." Haines notes in this respect that "before Marshall's opinion was rendered substantial beginnings had been made toward the establishment of state colleges or universities in other states as well as New Hampshire.

Following the trend indicated in the acts relating to educational institutions in New England and in the middle Atlantic states, state institutions, which later became universities, were established in North Carolina in 1795, South Carolina in 1805, Michigan in 1817, Virginia in 1819, and Indiana in 1820. Though the decision on the *Dartmouth College Case* put an end to the attempts to reorganize or to control the close corporations which were formed by the charters of certain educational institutions in the South and the West, it encouraged the establishment and maintenance of colleges and universities under state control and direction."

Marshall then assumed that Dartmouth College had been founded with private donations (an assumption which is belied by the fact that the College's support had been based mainly on public grants) and that hence its educational program was in the nature of a private rather than a public purpose. Therefore, he concluded 'after mature deliberation" that the College charter was a contract, "the obligation of which cannot be impaired without violating the Constitution of the United States," and the acts of the New Hampshire legislature, altering the charter without the consent of the corporation, in a material respect, were acts impairing the obligation of contract and "are repugnant to the Constitution of the United States." Hence they were unconstitutional and void!

Justice Johnson, Livingston, Washington and Story concurred with Marshall, Washington and Story later filing opinions of their own. Justice Duval dissented without explanation and Justice Todd did not participate in the decision. The University supporters were "dumbfounded" when Story's decision was announced. They had had reason to believe that Story was on their side, and they attributed his switch as well as the Court's decision in favor of the College, as due to unethical pressure and incompetent counsel. Dr. Perkins suggested to President William Allen of the University, that there had been "monkery" involved. "How unfortunate, we are," he lamented, "in not having our case properly prepared in New Hampshire for

this Court." If the facts had properly been stated, "which ought to have been found by the jury in New Hampshire—and I know could have been with such documents as we had at command, but for the numbskulls we had for counsel"—the University's case would never had been in doubt. Actually Pinkney had recognized this difficulty as soon as he investigated the facts. On February 14, 1819, he told Dr. Perkins he was "prodigiously vexed with the management of the cause in New Hampshire." If the case should be lost "it would be lost by the very slovenly manner in which it had been conducted."

Webster was elated by the decision. He wrote to his brother, Ezekiel: "All is safe. Judgment was rendered this morning, reversing the judgment in New Hampshire. . . . The opinion was delivered by the Chief Justice. It was very able and very elaborate; it goes the whole length, and leaves not an inch of ground for the University to stand on."

Hopkinson's letter to President Brown of the College, written the same morning, was widely publicized by its friends. "Our triumph in the College cause has been complete. Five judges, only six attending, concur not only in a decision in our favor, but in placing it upon principles broad and deep, and which secure corporations of this description from legislative despotism and party violence for the future. The Court goes all lengths with us and whatever trouble these gentlemen may give us in the future, in their great and pious zeal for the interests of learning, they cannot shake those principles which must and will restore Dartmouth College to its true and original owners. I would have an inscription over the door of your building, "*Founded by Eleazor Wheelock, Refounded by Daniel Webster.*"

One technicality arose, which Webster disposed of immediately after the Court's decision was announced. Woodward, the defendant in the case as Secretary of the University, had died on August 9, 1818 at the age of 43. Webster moved in open Court for judgment nunc pro tunc, which the Court granted as of March 13, 1818, in the sum

of $20,000. Later Webster wrote to Judge Smith: "I have in my bag a mandate to the Superior Court of Judicature of the State of New Hampshire to carry this judgment into Execution."

When word of the decision reached Hanover on February 9, during the winter vacation "the expressions of joy were excessive. The officers of the College entreated the inhabitants repeatedly to desist, but to no purpose." Cannons were fired off adding to the general bedlam.

And now—the auxiliary cases which had been instituted by the College and which were still pending in the Circuit Court, came back to haunt Webster and the College officials. Rumors arose that Pinkney and Wirt would introduce new facts and another legal battle would ensue. But Justice Story later disposed of these cases in the Circuit Court on the authority of the Supreme Court opinion. The College victory was indeed "complete," and before long control of Dartmouth College once again reposed in the old Board of Trustees. At the Commencement exercises for 1819, Webster was honored by his grateful Alma Mater at public exercises and at a dinner given by the Phi Beta Kappa Society. The Trustees passed a resolution offering their thanks to the lawyers who had represented the College. The expense of the litigation had cost the College about $6,000. Jeremiah Smith was paid $150, Jeremiah Mason $100 and Daniel Webster $50 for their services in the State Court. Webster was paid an additional $1,000 for his argument in the Supreme Court and Hopkinson, $500. The College authorities realized that their "eminent" counsel had been poorly compensated for their work and they therefore commissioned the great portrait painter Gilbert Stuart to paint their portraits. Portraits of Mason, Smith, Webster and Hopkinson now hang in Dartmouth Hall—but interestingly enough, not painted by Stuart.

Webster's argument and the role he played in the Dartmouth College case established his reputation from then on, as one of the leading members of the American Bar—a man marked to be the successor to Pinkney. Warren

notes that the case "established forever his reputation as a great jurist." Only three weeks after the decision in the Dartmouth College case, Webster and Wirt joined Pinkney in arguing for the Bank of the U.S. in *McCulloch v. Maryland,* and Hopkinson appeared on the other side representing the State!

The Dartmouth College opinion is one of the most famous written by Marshall. While Marshall did not refer to any cases, it is obvious that he was very much influenced by *Fletcher v. Peck.* Actually Marshall extended the principle of *Fletcher v. Peck* (that the contracts clause protected public grants) to corporate charters—that a charter was a contract within the meaning of the Contracts Clause. Marshall's decision as a result established the inviolability of corporate charters—and this had a marked affect on the economic development of the country. It turned out to be a landmark decision which encouraged the growth of business corporations by protecting private property rights.

Chancellor Kent believed "it did more than any other single act proceeding from the authority of the United States to throw an impregnable barrier around all rights and franchises derived from the grant of government, and to give solidity and inviolability to the literary, charitable, religious and commercial institutions of our country." Sir Henry Maine in his *Popular Government* added that the Dartmouth College opinion was "the basis of credit of many of the American Railway Incorporations . . . (it was) the bulwark of American individualism against democratic impatience and socialistic fantasy." Beveridge too was impressed by the "consequences" of the decision. Marshall's opinion "was a tremendous stimulant" to the natural tendency to employ the corporate form to promote business interests. "It is undeniable and undenied," he wrote, "that America could not have been developed so rapidly and solidly without the power which the law as announced by Marshall gave to industrial organization . . . . of even higher value it aligned on the side of nationalism all powerful economic forces operating through corporate organizations."

Marshall's opinion, however has not met with universal approval. Haines is particularly critical of it. He believes it is a good illustration of the method of the Chief Justice in construing and stating facts which give a plausible basis for the legal and political theories he wished to announce, without adhering closely to the actual evidence of the case. . . . He assumed that there was a contract between the crown and the donors and trustees when in fact no such contract was made; if at any time a contractual relationship had been established, it was an executed contract and, according to well established legal usage, there could be no obligation involved in such a contract. He also assumed that Dartmouth College was a private eleemosynary institution, whereas the major part of the funds secured for the College . . . were donated by the States or were subscribed under state assistance and patronage. The College was, therefore, more in the nature of a public than private institution. Finally, another one of Marshall's assumptions and one on which the entire case for the College was predicated was that the old corporation was destroyed and its property was dispersed. No such action had been taken. The corporate entity remained, and the property rights of the corporation were not in any way interferred with. . . . All of these assumptions are essential to the Court's opinion and all could be refuted by facts familiar to those who were acquainted with the history of the College. Webster, no doubt, had good grounds for opposing a reargument with the presentation to the Court of a new statement of facts."

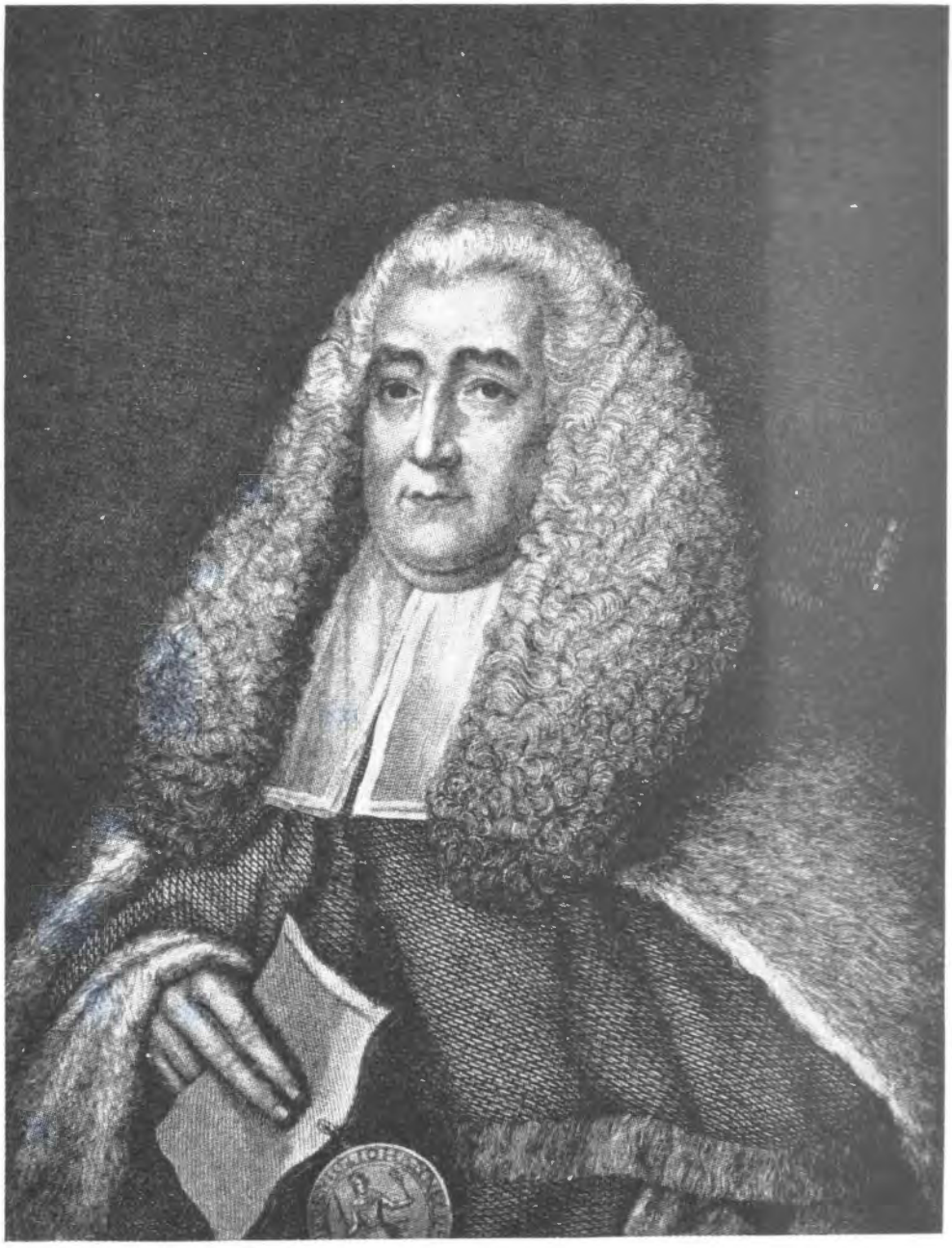
Although the immediate effect of the Dartmouth College Decision was to place the relationship between government and economic growth in a constitutional framework which protected the corporate form of industrial organization, its thrust was materially modified by later Supreme Court decisions. *Ogden v. Saunders,* 12 Wheat. 213 (1827) proved to be the turning point. There the indomitable Marshall finally had to taste defeat—and for the first time in his judicial career of 27 years found the majority of the Supreme Court opposed to him on a question of constitutional law. The majority held that a

state insolvency law does not apply to obligations of future contracts between its citizens but does apply to past contracts. Marshall insisted in his dissenting opinion that all contracts, *past and present,* were protected by the Contracts Clause from state legislation which in any manner impaired their obligation. Professor Schwartz notes that with *Ogden v. Saunders,* "the Contracts Clause virtually stopped growing." Thereafter the principles established by the Court with reference to the Contracts Clause "drastically restricted the scope of the constitutional provision." Then in *Charles River Bridge Co. v. Warren,* 11 Pet. 420 (1837), the Taney Court further modified the effect of the *Dartmouth College* decision when it held that "in grants by the public, nothing passes by implication"—that the terms of such public contracts were to be strictly construed in favor of the state. Another restriction on the Contracts Clause was imposed in *Stone v. Mississippi,* 101 U.S. 814 (1880) when the Supreme Court held that a state can not contract away its inalienable government powers such as its power over the health, safety and welfare of its citizens. It should also be noted that in *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934) during the emergency period resulting from the depression, states were allowed to extend the period for payment of private contracts in the form of mortgage obligations. The decision in *Santa Clara County, v. Southern Pacific R.R.,* 118 U.S. 394 (1886) declaring that "corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States" marked the decline of the Contracts Clause. From then on the "due process" clause of the Fourteenth Amendment, because of its wider scope, was used by corporations to protect property rights. Thereafter, as Dean Robert McKay aptly states "under the predominately laissez-faire philosophy of the Court late in the 19th century and early in the 20th century," there was a "wide-spread judicial, invalidation of legislation thought to be restrictive of free enterprise, whether in relation to individuals or corporations." The New Deal period changed this concept and now the states may freely

experiment with social and economic legislation reasonably related to "The evil sought to be remedied." *Nebbia v. N.Y.*, 291 U.S. 502 (1934) was the turning point.

One other restriction on the scope of the Contracts Clause should be noted. Justice Story in his concurring opinion suggested that corporate charters could not be altered or amended "unless a power for this purpose were reserved in the charter itself." Legislative reservation thereafter became a condition of all such contracts. By Supreme Court rulings, such state reservations of power need not be actually inserted in the original charter, but may be applicable if generally provided for in the State Constitution or in the State legislation. Most of the states now have such constitutional and legislative reservations of power. Thus the general use of such measures by the state governments and the use of the "due process" clause have contributed to the loss of importance of the Contracts Clause.

The rise and decline of the Contracts Clause reflect a fascinating aspect of American, socio-economic history. It was a principle Beveridge says "which Marshall introduced into American constitutional law." Although it has been stripped of much of its importance it still stands as a durable monument to the great Chief Justice—a fitting testimonial to his wisdom, insight and statesmanship. "Marshall found the Constitution paper; and he made it power," said James A. Garfield. "He found a skeleton, and he clothed it with flesh and blood." How true!



SIR WILLIAM BLACKSTONE.

Blackstone Revisited

The Most Popular Law Book Ever Published

Hargrave, the able annotator of Coke on Littleton, is alleged to have said of Blackstone's *Commentaries on the Laws of England,* that "any lawyer who writes so clearly as to be intelligible is an enemy to his profession." Last October, as I walked from the Sheldonian Theatre to the Codrington Library of All Souls College this cynical compliment came to mind. For the tradition emanating from the historic buildings and venerable colleges at Oxford, appeared to echo everywhere I went, "Blackstone was here!—and here!—and here!" Somehow I imagined I had acquired a sense of continuity with the past and with Blackstone. Perhaps it was my own interest in legal history that triggered this train of thought. Perhaps it was the Sheldonian Theatre, with its elegant grandeur and style and the realization that even though it had been designed by Sir Christopher Wren in the 1660's it was still being used for public ceremonies. Perhaps it was the knowledge that the Clarendon Press of Oxford University, which Blackstone had reorganized, was lodged in his day in the old building I was facing, so that surely he must have trodden the same stones and sod I was standing on.

Approaching the stone screen and cloister which divides the quadrangle of All Souls College from the rest of the campus, I saw the twin towers rising from the eastern range of buildings, partly Gothic and partly classical in style, yet impressively dignified where the Codrington Library is situated. These, too, speak of Blackstone. For he had been more than a great commentator on the laws of England. He had also been a professional architect and, I like to think, a librarian as well. The building before me, although designed by a favorite pupil of Sir Christopher Wren early in the 18th Century, had not attained its magnificent proportions until Blackstone corrected the errors in the original plans and supervised its final construction. And it was Blackstone who, after Sir Christopher Codrington had left Oxford £50,000 for a library building and his valuable collection of books, classified the collection and arranged the books on the shelves in proper order.

Then I entered the great hall of the Codrington Library. I could not help being impressed by the multitiered arrangement of handsome old books and the hallowed effect of the long hall and to admire the artistic statue in white stone of a seated Blackstone with a copy of his lectures in his left hand and the *Commentaries* under his right arm. The statue had been presented to the College in 1784 and first placed in the hall where Blackstone had lectured on English Law; then for many years it had been in the Codrington Library with which he had been so closely associated.

As I studied Blackstone's dignified and stern features and mused over his personality and contribution to Anglo-American law, I could not help surmising that his extraordinary career gave proof to the dictum of the great Disraeli that "The way to learn about a subject is to write a book about it." For Blackstone had been a failure as a lawyer until he returned to Oxford and wrote his great *Commentaries.*

"Twice in the history of England" wrote Maitland, "has an Englishman had the initiative, the courage, the

power to write a great, readable book about the English law as a whole." Bracton's *De Legibus* was one and Blackstone's *Commentaries* another. Prior to Blackstone a law student's lot, in the words of the old refrain, was not a happy one. Not only were the books available for the study of law few in number and quite inadequate for the purpose, but actually, the study of English Law itself had disintegrated to such an extent that law students had much difficulty in acquiring even a smattering of the law. Legal education at the time was at its nadir.

In fact, it has been suggested that it was non-existent. That this should be so, was indeed paradoxical, as Hanbury properly notes, for although Civil Law was being taught in the Universities despite the fact that the reception of Roman Law into English Law was conspicuous by its absence, English Law was ignored. As late as the 16th century, when Henry VIII prohibited the study of Canon Law, he nonetheless established the Regius Professorships of Civil Law at Oxford and Cambridge to perpetuate the study of Roman Law as a foreign system of law. And despite the many eloquent appeals addressed to the university authorities to introduce courses on English Law into the curriculum, only the Inns of Court in London offered any training in English Law.

By the 18th century, however, although the Inns of Court still maintained their privileges in calling students to the Bar, they offered very little else. The four Inns of Court, known as the Inner Temple, the Middle Temple, Lincoln's Inn and Gray's Inn could trace their history back to the 14th century. Originally, their primary purpose, appeared to be the cultural development of their students. True they were also concerned with the study and practice of law, but in the main, as Sir John Fortescue wrote in his classic *De Laudibus Legum Angliae* in 1468, the Inns were schools where young Englishmen of rank and distinguished families were taught singing, dancing and the desirable manners required of English gentlemen. Fortescue also noted, and this was of importance, that the Inns inculcated into their students ideals of public service,

broadened vision, and a national outlook. Thus, life in the Inns was much different from the Universities, where scholasticism prevailed. By the 17th century, the Inns of Court concerned themselves solely with the study and practice of law, dropping their role as seminaries for the education of youth for the Bench and Bar and government service.

During Blackstone's time, even this aspect of their activity had so decayed that the Inns had practically ceased to teach law. Readings and lectures were no longer offered, and although some exercises were continued, they had become so formalized, that as Holdsworth expressed it, the Inns lost their "collegiate character." Aside from the moots and mock briefs, the failure of the Inns to provide their students with a basic understanding of fundamental principles of law and the science of jurisprudence which the Readers and Lecturers had covered in the past, caused the system to collapse.

How then did a young Englishman study law? The universities offered no courses in English Law. After admission to one of the Inns, he necessarily had to serve an apprenticeship in a barrister's office with the hope that he would learn by being observant; or he had to educate himself by reading law. What did he read for this purpose? Here too, he was confronted by formidable difficulties. For textbooks he had to rely mainly on *Coke's Institutes* (1628-1642) and the *Doctor and the Student* (1523 (Latin), 1530 (English)).

Coke, erudite and profound, was depressingly dull and quite unintelligible to a neophyte in the law. In addition to reflecting deplorable disorganization and marked pedantry, his *Institutes* only offered a 17th century version of English Law. They were significant, however, in that they served as "The link between the Middle Ages and Modern Times," preserving for posterity the sources and traditions from which English Law had originated. Yet, despite the *Institute's* shortcomings, they represented the only complete survey of English Law from Bracton's time—and even more importantly, were written in English.

The *Doctor and Student* was about the only other text a law student could read with any profit. Called by its full title *A Dialogue between A Doctor of Divinity and A Student of the Laws of England*, it had been first published in Latin around 1523 by a member of the Inner Temple believed to be Christopher St. Germain. After several editions, it was translated into English, probably by the author. The book inquires by means of a dialogue into the "grounds and reasons of the common law . . . to show how consistent every one of its precepts are with right reason and a good conscience." In the 18th century, it was read conscientiously by all students preparing for the practice of law.

This "delightful" text as Lord Goddard, Lord Chief Justice of England has described it, added generally to the confused knowledge of the law held by the enterprising law student who tackled it. Lord Goddard culled "one flower from this bouquet" which well deserves to be brought to light. The student inquires "If a man that hath lands for a term of life be impanelled upon an inquest and thereupon leaseth issues and dieth, whether those issues may be levied upon him in the reversion in conscience as they may be by law?" Lord Goddard was impelled to comment on this gem, "Well if that did not stump the doctor, I don't know what would, for I haven't the least idea what the student was talking about. But with such material how was a student to begin to learn law? The wonder is he did not turn in loathing from such a repulsive subject." Lord Hardwicke, referring to his early 18th century law student days, bewailed that his legal education involved "crabbed barbarous study that has the greatest tendency to make a man unmannerly."

Blackstone decided to change all this, as well as the system of legal education prevailing in his day. He introduced the problem in the first volume of his *Commentaries*.

"A raw and inexperienced youth in the most dangerous season of life is transplanted on a sudden into the midst of allurements to pleasure without any restraint or check except what his own prudence can suggest, with no public direction in what course to pursue his inquiries; no

private assistance to remove the distresses and difficulties which will always embarrass a beginner. He is expected by a tedious, lonely process to extract the theory of law from a mass of undigested learning or else by an assiduous attendance in the courts, to pick up theory and practice sufficient to qualify himself for the ordinary run of business. Is it to be wondered that so many of moderate capacity confuse themselves at first setting out and continue ever-dark and puzzled for the remainder of their lives?"

It is indeed a strange commentary on the pecularities of fate that Blackstone's greatest disappointment later proved to be the turning point in his career and the cause of his unrivaled success. Actually, his life's story reads like an Horatio Alger saga. Born a commoner in London on July 10, 1723, he became an orphan at an early age. With the help of his uncle, he attended school and subsequently Pembroke College, Oxford. At Pembroke, he studied architecture, wrote poetry and translated several of the classics into English. He was admitted to the Middle Temple in 1741, where he began the study of law.

Oxford, impressed by his scholarly potential, elected him a Fellow of the *Society of All Souls College* in 1743. As a result, he divided his time studying and teaching at Oxford and preparing for the practice of law at the Middle Temple. At the age of 22, he was graduated from Oxford with the degree of Bachelor of Civil Law and was called to the Bar the following year.

While he attempted to build up his law practice, he continued his association with Oxford, holding many administrative positions of importance. In 1750 he became Doctor of Civil Law and published "An Essay on Collateral Consanguinity" which established the rights of kin of the founder of All Souls College to priority in election to the *Society*. At the age of 30, he realized that he was unsuccessful as a lawyer, abandoned the practice of law and returned to Oxford to pursue his academic career as a Fellow.

While he had waited for his practice to develop, how-

ever, he had not been idle, making friends with a fellow member of the Middle Temple, William Murray, later Lord Mansfield, Chief Justice of the King's Bench. He also followed the arguments and trials in the King's Bench. He took copious and careful notes of these cases and they were later published posthumously as *Blackstone's Reports*.

Back at Oxford, Blackstone in 1753 began the preparation of a series of lectures he planned to deliver on English law. That same year he suffered one of the great disappointments which oddly enough was later to insure his success in law. The Regius Professorship in Civil Law at Oxford, one of the most important chairs at the University, became vacant, and William Murray, then Attorney General, recommended to the Duke of Newcastle, the Chancellor of Oxford, that Blackstone be appointed. Holliday, in his life of Mansfield, described Blackstone's interview with the Duke.

"Sir," said the Duke, "I can rely on your friend, Mr. Murray's judgment as to your giving law lectures in a good style, so as to benefit the students; and I dare say, that I may safely rely on you whenever anything in the political hemisphere is agitated in that University, you will sir, extert yourself in our behalf." The answer was, "Your Grace may be assured that I will discharge my duty in giving law lectures to the best of my poor abilities." "Aye! Aye!" replied His Grace hastily, "and your duty in the other branch too."

Reluctant to be thus bound, Blackstone did not reply but merely bowed in apparent assent. Not satisfied with Blackstone's reply and politics, Newcastle appointed his rival Dr. Jenner, to the chair. Although Blackstone was exceedingly unhappy with the loss of a position which would have given him tremendous prestige and a handsome income, the Duke's decision caused him to direct his thinking to the common law rather than to the civil law. If he had been appointed as Regius Professor, Blackstone would have become just another teacher of Roman law. By reason of his disappointment, however, with the encour-

agement of Murray and others, Blackstone decided to give a course of lectures on English Law—the first ever attempted in an English University.

Thus in 1753, as an ordinary Fellow of All Souls College, Blackstone announced that he would read his lectures to all who were prepared to pay a fee of six guineas. Not only were lectures on English law a startling innovation; the fee charged for attendance was unusually large. Blackstone's purpose was to instruct young men in the principles of English law and to acquaint other young Oxonians who would ultimately become landowners and Justices of the Peace with the intricacies of the common law. In this respect his lectures were a popular exposition of the laws of England. Until the late 19th century, the landed gentry, although not lawyers, administered the local government of the counties, and held positions as Justices of the Peace. For that reason many attended the Inns of Court, not to become lawyers, but rather to obtain an understanding of the administration of justice. Despite the heavy fee, the lectures proved to be an immediate success. James Clitherow, Blackstone's brother-in-law, later wrote that the lectures "were attended by a very crowded class of young men of the first families, characters and hopes." Scattered throughout the lecture hall were also some students from the American colonies, who were in later years to play an important role in the formation of the new American government.

The following year Blackstone repeated his lectures, this time providing his students with a guide to his notes entitled *"An Analysis of the Laws of England."* This *Analysis* and his lectures later became the substance of his famous *Commentaries on the Law of England.* Blackstone's lectures continued to be popularly acclaimed and when by reason thereof the Vinerian Professorship of English Law was established in 1758 at Oxford, Blackstone was elected unanimously as the first occupant of that chair. As Vinerian Professor, Blackstone was granted £200 a year for life and was required to read in English sixty lectures a year on the Laws of England.

Thus, as a result of Blackstone's pioneer efforts, for the first time, the study of English common law was given comparable status to Roman law at an important English University.

Blackstone's first lecture as Vinerian Professor was published in 1758 at the request of the University authorities and thereafter was adopted as the introduction to the *Commentaries*. Blackstone was aware of the historic role his lectures were serving and dedicated himself to fulfilling the purpose of the Vinerian grant. "The general expectation," he commented, "of so numerous and respectable an audience, the novelty (I may add) the importance of the duty required from this chair, must unavoidably be productive of great diffidence and apprehension in him who has the honor to be placed in it. He must be sensible how much will depend upon his conduct in the infancy of a study, which is now first adopted by public academical authority; which has generally been reputed (however unjustly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate share of cultivation. He cannot but reflect that, if either his plan of instruction be crude and injudicious, or the execution of it lame and superficial, it will cast a damp upon the farther progress of this most useful and most rational branch of learning; and may defeat for a time the public-spirited design of our wise and munificient benefactor."

Blackstone continued his lectures with marked and impressive success. His reputation as a legal scholar was established not only in England, but in the American colonies. So highly were his lectures thought of in England that the Earl of Bute, who was responsible for the education of the Prince of Wales, later George III, invited Blackstone to read them privately to the Prince. Blackstone regretfully declined but sent him a copy of his lectures, which the Earl discussed in great detail with the Prince after reading them to him. The Prince was so pleased, he sent Blackstone "a hansome gratuity." The American colonists became aware of the lectures through

letters sent by Americans, such as John Adams and Jonathan Sewell, who were in England at the time. John Watts, an influential New York merchant, wrote in 1762 to a friend in New York:

"We have a high character of a Professor at Oxford, who they say has brought that mysterious business (The Study of Law) to some system besides the system of confounding other people and picking their pockets, which most of the profession understand pretty well. . ."

Blackstone's success as a lecturer encouraged him to try once again to build up a law practice. He continued on as Vinerian Professor, but after 1759 he reestablished himself in chambers at the Middle Temple in London and spent most of his time there. His law practice this time flourished. He was appointed Solicitor-General to the Queen in 1763 and chosen a Bencher of the Middle Temple the same year.

He was doing so well by 1766 that he found it necessary to resign as Vinerian Professor. Prior to his resignation, however, Blackstone decided to publish his lectures. He had heard that some pirated editions of his lectures were being considered for publication, and that "the notes which were taken by his hearers, have by some of them (too partial in his favor) been thought worth revising and transcribing; and these transcripts have been frequently lent to others. Hence, copies have been multiplied, in their nature, imperfect if not erroneous; some of which have fallen into mercenary hands and become the object of a clandestine sale. Having, therefore, so much reason to apprehend a surreptitious impression, he chose rather to submit his own errors to the world than to seem answerable for those of other men."

The first volume of his *Commentaries on the Laws of England* appeared in 1765, printed by the Clarendon Press, Oxford University, and its design, type and paper reflect well on the Press and on Blackstone who had become a Delegate thereof in 1755. Volume II appeared in 1766, Volume III in 1768, and Volume IV in 1769.

Blackstone also proposed a plan to the Vice-

Chancellor of Oxford for the establishment there of a school for instruction in the common law similar to the one on civil law at Trinity College, Cambridge. The plan was approved by the Delegates but was rejected in convocation. Apparently, this action was one of the reasons for his resignation as Vinerian Professor. The effect of Blackstone's Vinerian lectures and proposal for a law school was significant. Holdsworth has aptly noted that "Though Blackstone's attempt to establish a system of legal education then failed, it has had some very important effects. It showed up the evils of the absence of a system of legal education in a manner which assisted the reformers of the nineteenth century; it helped to introduce in America, more quickly than in England, the public teaching of law; and it gave to the students of English law what they had long needed—a book of Institutes, of such merit that it became a legal classic both in England and America."

Blackstone's lectures in one sense continued the tradition of readings that had been characteristic of law instruction in the old Inns of Court. The readers in the Inns, however, confined their analysis strictly to the technical law. Blackstone departed from this method when he related law to other disciplines taught at Oxford University, such as history, philosophy and politics, thus reflecting the humanistic spirit of his time. By introducing these other studies in his lectures he was able to sustain his thesis that English law should be theoretically studied as a system.

Blackstone's Vinerian lectures became the inspiration for the establishment of the first Common-Law Professorship in America, at William and Mary College in Virginia. George Wythe, one of the leading legal scholars in America at the time, was appointed in 1779, by Thomas Jefferson, then Governor of Virginia, to be law professor at the University. It is well known that one of Professor Wythe's students in 1779-1780 was John Marshall, later to become the celebrated Chief Justice of the United States. Ezra Stiles, President of Yale, suggested a similar

professorship at that University in 1777, but was unsuccessful. In the 19th century, the Dane Professorship at Harvard and the institutional Commentaries of Kent and Story can also be traced directly back to Blackstone's influence. Not to be overlooked was St. George Tucker who succeeded Wythe as Professor of Law at William and Mary. His five-volume American edition of Blackstone (1803) contained one of the first important commentaries on the New American Constitution.

The success of *Blackstone's Commentaries* was immediate and impressive. The first edition was sold out completely at four guineas, and Blackstone during his lifetime revised eight editions himself. It has been estimated that his income from royalties and the sale of the copyright amounted to close to £16,000. The purchaser of the copyright earned £10,000 independently. The *Commentaries* are supposed to be the most popular law book ever published. Twenty-one editions of the *Commentaries* were printed in England, three in Ireland and about twelve in the United States. The book has been translated into French, Russian, German, Spanish and Italian. The last complete English edition appeared in 1844 after much editorial revision. In 1841 Serjeant Stephen published his own *Commentaries*, based on Blackstone's, which reflected the considerable changes in the law that had taken place in England in the seventy-odd years from its first publication. Stephen's *Commentaries*, which in a sense has replaced Blackstone's, is now in its 21st edition.

The *Commentaries* reached the final pinnacle of success when the magazine Punch in 1840 featured a series of humorous articles by Gilbert A. à Becket with illustrations by Cruikshank which satirized some of Blackstone's concepts. Later published in book form as the *Comic Blackstone*, it enjoyed a huge sale.

Blackstone arranged the *Commentaries* in an Introduction and four books. In the Introduction, Blackstone considers the need for legal education, the philosophy and nature of law, the law of England in which the distinction between *lex scripta* and *lex non scripta* is brought out, as

well as the place of equity in English law, and then concludes with countries subject to the law of England and how the common law is transplanted to the colonies. The four following volumes are divided according to the classic division of Roman law into: I. *The Rights of Persons* (constitutional law as it affects the King, his prerogative, and Parliament; aliens; husband and wife; master and servant; guardian and ward, etc.); II. *The Rights of Things* (real and personal property); III. *Private Wrongs* (torts, courts, their jurisdiction and procedure); IV. *Public Wrongs* (criminal law and procedure).

Much has been written on the reasons for the unusual reception accorded Blackstone's *Commentaries*. First it should be noted that his lucid and graceful literary style was a welcome contrast to the pedantry characteristic of law books in his day. Blackstone wrote for the educated laymen of property and position so that they could have a general and systematic knowledge of English law and Institutions to guide them in the conduct of their personal affairs and matters of government. His *Commentaries* were therefore a popular explosition which could be understood not only by the Bar but by intelligent laymen as well. This accomplishment by itself was an innovation which the public eagerly approved. Even Jeremy Bentham, who bitterly criticized the *Commentaries*, acknowledged reluctantly that Blackstone "has taught jurisprudence to speak the language of the scholar and the gentleman . . . [and] has decked her out . . . to advantage from the toilette of classical erudition; enlivened her with metaphors and allusions; and sent her abroad in some measure to instruct and in still greater measure to entertain . . ."

Another extraordinary achievement of Blackstone, as Professor Thayer expressed it, lay in his success "in the really Herculean task of reducing to orderly statements and to an approximately scientific form the disordered bulk of our common law." In essence Blackstone epitomized scientifically how the law had developed in England from the time Coke in his *Institutes* had laid the

foundation of the modern common law, and gave a comprehensive understanding of how it stood in his own day. As Stephen has said, "Blackstone first rescued the law of England from chaos. He did and did exceedingly well, for the end of the eighteenth century, what Coke tried to do, and did exceedingly ill, about 150 years before; that is to say, he gave an account of the law as a whole, capable of being studied, not only without disgust, but with interest and profit. If we except the *Commentaries* of Chancellor Kent, which were suggested by Blackstone, I should doubt whether any work intended to describe the whole of the law of any country possessed anything like the same merits." It was Blackstone therefore who finally made out of the hodge-podge of English law a recognizable and mature system of justice which could proudly take its place and be identified alongside the Civil Law System.

Blackstone was a learned lawyer and highly cultivated, but he was not an original thinker. He therefore borrowed a great deal from Grotius, Pufendorf, Locke, Burlamaqui and Montesquieu, especially in that part of his lectures in which he expounded on philosophical generalizations concerning the nature of law. As a result, his views on law and government and law and ethics reflected the confusing and contradictory thinking of his period and subjected him to severe criticism, especially from Jeremy Bentham. Blackstone was more successful in his historical treatment of the law. He realized that a proper explanation of the principles of law as they were administered in the 18th century could not be made unless their historical and comparative development were also set forth. He thus borrowed liberally from Bracton, Fortescue, Coke, Selden, and especially Hale, as well as from the institutional writers of the civil law system to explain the *raison d'etre* for the legal principles he expounded. It is to Blackstone's credit, however, that in organizing his materials, he discarded their methods and arrangement, considering them antiquarian, and developed his own outline, principally following *The Analysis of the Laws* of Sir Mathew Hale.

In his complacent defense of and satisfaction with the English law and institutions of his time, especially in his praise of the British constitutional system, Blackstone reflected his own deep conservatism, as well as that of the English bar. Jeremy Bentham, as a youth of 16, attended Blackstone's lectures in 1763. He was bitterly critical of Blackstone, calling him "formal, precise and affected, cold, reserved and wary, exhibiting a frigid pride." He later wrote a *Comment on the Commentaries* with the purpose of stripping Blackstone of his authority so that reform could be instigated in the law. Bentham wrote that the attributes Blackstone gave to the sovereign "stuck in my stomach." Two of Blackstone's definitions were vehemently criticized:

"Law in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action; whether animate or inanimate, rational or irrational."

"The Supreme power in a state" or sovereignty, no matter how it came to power had to be "supreme, irresistible, absolute, uncontrolled authority."

It is to be remembered, however, that Blackstone's commentary on the English constitutional system represents but a minor part of his work, the major portion being concerned with private law; and there it is noted for its accuracy. Windeyer properly notes that for Blackstone, "to have seen the principles behind the rules, and substantive law behind remedies, was then a great achievement."

As much as Blackstone was attacked, he was also equally defended. His critics were charged with misjudging the purpose of the *Commentaries*, concentrating on minuscule parts of the work and failing to see its more sweeping importance. Lord Mansfield and Edmund Burke in his day, and such great contemporary legal scholars as Pollock, Dicey, Holdsworth and Plucknett have come to his defense although recognizing his weaknesses, especially his tendency to praise and find perfect the established order and constitutional system of his day. Pollock

has added that "Blackstone caught and expressed the spirit of his time with consummate skill but he caught it just in time. Hardly was his ink dry when Bentham sounded a blast that rudely disturbed the supposed finality of the common law."

No review of Blackstone would be complete without referring to his influence in America. Close to 2500 copies were purchased in the American colonies prior to the Revolution.

The first American edition of Blackstone, published by Robert Bell in Philadelphia in 1771-1772, was the first general law book published in the colonies.

About 1400 sets were ordered of the American edition in advance of its publication in 1771-1772. The price was three pounds per set. Before then, more than 1,000 sets of the English edition had been imported in the colonies at ten pounds per set, because of the publicity it received from Americans who had studied law in England. The names of the subscribers to the American edition are equivalent to a "who's who" in the colonies. Their names appear in volume four of the set and include the British governors of Virginia, Pennsylvania, Connecticut and East Florida, as well as such political and juridical leaders as John Adams, George Clinton, Nathaniel Greene, John Jay, Governor Morris, Robert Morris, St. George Tucker, Oliver Walcott and James Wilson. In addition, subscribers included attorneys, judges, government officials and even cabinet makers, farmers, students, professors, merchants, and printers.

Blackstone's *Commentaries* was so well received in the colonies that Edmund Burke in his notable conciliation speech in the House of Commons on March 22, 1776 found it necessary to remark: "I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those of the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England."

A number of peculiarities of the American edition deserve notice:

The American publishers lacked the type necessary to copy the printed English edition exactly. On page 27 of Volume I, the editor noted that "there being no Greek characters at present in Philadelphia, we hope the learned reader will accept the Greek in Roman letters." This with reference to a Greek quotation.

Note too, the following apology which appears at the end of the table of contents:

"If any reader of this edition meets with some words uncommonly spelled, he is requested, not hastily to blame the *American* editor; because report sayeth, the last British edition was corrected under the immediate inspection of the learned author, and it has been the practice of several great men to spell many words in their own peculiar manner—therefore, the *American* editor, to make this American edition a perfect transcript of the last British edition, has adhered to it as literally as possible."

Actually Blackstone gave little attention to the effect his thoughts would have on the American colonists. Considering the colonies as conquered or ceded countries with laws of their own, he concluded that the colonials could not claim the inherent rights of Englishmen living in England. "They are," however, "subject to the control of Parliament, though (like Ireland) not bound by any Acts of Parliament, unless particularly named." Nevertheless, the American colonists refused to accept Blackstone's classification of their status and vehemently insisted to the contrary that they were entitled to all the rights of native Englishmen so clearly enumerated in the *Commentaries*. This issue ultimately became a bone of contention which influenced their resolution to revolt from the English governments. For Blackstone taught them that Englishmen's rights were based on nature and reason and historically illustrated how the Bill of Rights and the Habeas Corpus Act had preserved them in the English constitutional system. It is also to be noted, as F. N. Thorpe astutely expressed it, that the *Commentaries* en-

lightened the framers of our Constitution on how to give legal form to democratic ideas of government. "The American Revolution could have wholly miscarried had its principles failed to attain expression in legal form."

The late George W. Wickersham believed that although the philosophy of the Declaration of Independence usually is ascribed to Locke and Paine, it appeared to him "that one may clearly trace the influence of Blackstone's *Commentaries* on the mind of Jefferson, in the affirmation of the Declaration that all men are born with certain inalienable rights, among which are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." He added that the counts in the indictment of George III, set forth in the Declaration of Independence, in the main were derived from the American colonists' reading of Blackstone's authoritative description of the rights of Englishmen and the principles of the British Constitution. As examples the following are cited:

"He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries";

"For depriving us, in many cases of the benefits of trial by jury";

"For taking away our charter, abolishing our most valuable laws and altering fundamentally the forms of our government."

Wickersham interestingly concludes: "Little did the Great Commentator realize when he read his lectures to a polite and scholarly audience at Oxford the weapon he unwittingly was forging for the colonists in North America." And F. N. Thorpe declared it to be a paradox without parallel in history that the monarchical Blackstone should contribute to the establishment of Democracy in America by so describing the rights of Englishmen that the Americans were to assert that they could alter or abolish any government attempting to destroy them.

Blackstone's influence in America can also be traced

to the Constitutional Convention which framed the American Constitution. Most of the delegates had read Blackstone, and the terms they used in the Constitution were understood in the context of Blackstone's exposition. To Blackstone may be attributed the use of such words and phrases in the Constitution as "due process," "crimes and misdemeanors," "treason," "felonies," "ex post facto law," "criminal persecution," "judicial power," "legal rights and liabilities," "remedies" and others. As many state constitutions were modeled after the federal constitution, it becomes clearer how significantly Blackstone contributed to the formation of the basic law of the United States.

In 19th century America Blackstone was cited as authority in all the courts, especially in the field of private law. The first impression many of the leading American jurists had of law was obtained from a reading of Blackstone. James Kent wrote, "when the college (Yale) was broken up and dispersed in July 1779 by the British, I retired to a country village and finding Blackstone's *Commentaries*, I read the fourth volume, parts of the work struck my taste and the work inspired me at the age of 16 with awe, and I fondly determined to be a lawyer." Abraham Lincoln said of Blackstone "the more I read the more intensely interested I became. Never in my whole life was my mind so thoroughly absorbed. I read until I devoured them." In fact, the *Commentaries* made it appear so easy to learn law, that many read the work quickly without studying any of the other authorities so that they merely obtained a superficial knowledge of the law. St. George Tucker derisively called them "Blackstone lawyers." Jefferson said in 1813 that Blackstone should be "uncanonized," for although his book was "the most elegant and best digested of our law catalogue [it] has been perverted more than all others to the degeneracy of legal science. A student finds there a smattering of everything and his indolence easily persuades him, that if he understands that book, he is master of the whole body of the law."

After 1766, Blackstone concentrated on his legal prac-

tice, became a member of Parliament and in 1770 was appointed a judge of the Common Pleas after being knighted. He died on February 14, 1780.

Although Blackstone's *Commentaries* are now for the most part obsolete, in the words of Beveridge, it is a "work which was and remains the poetry of the law." Professor Hansbury, dwelling on the *Commentaries*' importance, sums it up well: "The book exudes learning and shrewd judgment, and, in point of style, is unsurpassed by any other writing in the literature of English law, on whose development its influence has been immense, and will never fade so long as that law endures. Here, as Dryden said of Chaucer, we have 'God's plenty'."

The Case of the Outraged Lawyer

Evidence of Malice in a Manslaughter Prosecution

Boston long remembered August 4, 1806, as "Bloody Monday," the day Charles Austin, son of a wealthy Republican organizer, was shot and killed by a prominent Federalist attorney, Thomas O. Selfridge. Arising out of a political feud with comic dimensions, the sensational trial that followed—so ably argued by counsel—itself earned a place in history.

Strangely, the immediate cause of the dispute was not between Austin and Selfridge but rather between other parties—and concerned *seven roast pigs and ten bushels of green peas*, as a contemporary observer noted.

July 4, 1806 was a beautiful, sunny, clear day in Boston, and both the Federalists and the Republicans took advantage of it to observe the National birthday with speeches, parades and banquets. Political feelings were high at the time, for the Republicans were flush with continued success at the polls and the Federalists were desperately attempting to preserve their waning political power.

The Federalists held a grand banquet at Faneuil Hall and had among their honored guests, John Adams,

Elbridge Gerry and Robert Treat Paine, signers of the Declaration of Independence. The Republicans marched in a triumphant procession with military escort from the State House to Copp's Hill where they planned to feast merrily under a huge tent which they had erected there for the purpose. Floating majestically in the wind, atop the tent was a long banner on which was inscribed "Hilarity, Philanthropy and Fraternity." Benjamin Austin was in charge of the festivities, and he walked proudly at the head of the procession as president of the Republican marchers. He had arranged for a tavern owner, a Mr. Eager, to cater the event and promised to pay for the food and drink from the proceeds of tickets sold.

Unfortunately for Austin, the Tunisian ambassador to the United States, was visiting Boston at the time, and he accepted an invitation to participate in the parade and attend the celebration at Copp's Hill. Wearing a turban, a long grey beard and colorful Oriental clothes and followed by a retinue of his officials similarly garbed, he was a sensation. People fought to get a glimpse of the "Turk" and followed him in riotous disorder right up to and into the tent, brushing aside Austin and his committee members, and without buying tickets devoured all the food and drink they could grab.

When it came to the accounting, Eager, the caterer, submitted a bill which exceeded the receipts Austin had collected. Austin and his committee members believed, however, that they were not personally liable for the amount due over and above what they had collected, as they had acted on behalf of others.

Unhappy with this offer, Eager sought Selfridge's advice. Selfridge, a lawyer who had gained a fine reputation in Boston, recognized that it was legally questionable under the circumstances whether Austin and his colleagues were personally liable for Eager's bill. However, after some thought, he recommended that a lawsuit be instituted to recover the amount due and Eager authorized him to proceed.

Benjamin Austin was a contentious and quarrelsome

person. After Selfridge filed suit, Austin exclaimed that it was entirely unnecessary as his Committee members were negotiating a settlement with Eager. He then added it was a Federalist plot to embarrass the Republicans and that Eager actually was not interested in a law suit, but had been persuaded by "that Federalist lawyer," meaning Selfridge, to institute the action. Austin later reiterated to others that Selfridge had personally "solicited" the suit. Abraham Babock, who was asked to intervene in the matter, finally arranged for a settlement, but only after Austin angrily muttered that Selfridge had "sought the case."

Babock went directly to Selfridge's office to advise him of the settlement. Selfridge was pleased with this information but became highly agitated when Babock told him of Austin's comments. Apparently others who had heard Austin's defamatory remarks had circulated them and Selfridge was aware of them. This was the final blow to his pride and professionalism, and he could hardly contain himself. He asked his friend Thomas Welsh to seek a retraction from Austin. Austin replied that he had heard of the report of the solicitation from another person, which he had considered disgraceful and unprofessional. Actually he emphasized, he had never mentioned Selfridge's name but rather had referred to a "Federalist lawyer." He then admitted that the charge was untrue and he had personally contradicted it to all the persons he had told about it.

Selfridge, however, was unappeased. He insisted on a formal written retraction and that it should be published in a newspaper. Austin refused. Selfridge then sent the following letter to Austin on July 30, 1806:

> "Sir: The declarations you have made to Mr. Welsh are jesuitically false and your concessions wholly unsatisfactory. You acknowledge to have spread a base falsehood against my professional reputation. Two alternatives therefore present themselves to you—either give me the author's name or assume it yourself. You call the author a gentleman and probably a friend. He is in grain a liar and a

> scoundrel. If you assume a falsehood yourself to screen your friend, you must acknowledge it under your own and give me the means of vindicating myself against the effect of your aspersion. A man who has been guilty of so gross a violation of truth and honor as to fabricate the story you have propagated, I will not trust; he must give me some better pledge than his word for present indemnity and future security. The positions I have taken are too obviously just to admit of any illustration, and there is no ingenious mind would revolt from a compliance with my requisitions.
>
> I am sir, your humble serv't.
>
> Tho. O. Selfridge."

Austin refused to make any further concession and told Welsh that Selfridge was expecting more of him than the occasion required. Welsh replied that Selfridge had learned that Austin had actually referred to him as that "Federalist" lawyer, "And as to your denial, we think that you have not made the contradiction to all the persons to whom you told the story, and even a verbal denial to all of them would not reach the numerous persons to whom they may have repeated it. This is why Mr. Selfridge insists on a letter which may be published in such a way that it will reach the whole community."

When Selfridge learned from Welsh that Austin would not proceed further in alleviating the situation, he told Welsh that he had only three alternatives for obtaining redress: "prosecution, chastisement, or posting." Welsh later testified at the trial that Selfridge reasoned "a prosecution was out of the question because a legal remedy from its nature, were it certain in the event, could not be so promptly and efficaciously administered as the degree and kind of injury imperiously required. It would take two or three years to have an action decided, but few persons would ever know the result, and those few would be those only, who were conversant with the reporter's volume, and not clients and men of business, from whom he derived his living; that the damage arising to him would be unsusceptible of proof, for it would be impossible to prove who had abstained from employing him professionally . . . and

while the process was pending, his business would dwindle away, and the cause would be unknown or forgotten, and the permanency of the evil would remain unrelieved."

With reference to "chastisement," his poor physical condition made it impracticable and "to rely upon friends for protection, or to permit them to interfere when he commenced the affray, would be an act of cowardice;—that this mode of redress savored too much of malice and revenge to be compatible with an honorable desire of procuring reparation for an injury . . . Posting, therefore, he said, was the only remaining alternative."

As a result, the *Boston Gazette* of August 4, 1806, featured the following notice:

> "Benjamin Austin, loan officer, having acknowledged that he has circulated an infamous falsehood concerning my professional conduct, in a certain cause, and having refused to give the satisfaction due to a gentlemen in similar cases—I hereby publish said Austin as a coward, a liar and a scoundrel; and if said Austin has the effrontery to deny any part of the charge, he shall be silenced by the most irrefragable proof.
>
> Thomas O. Selfridge
>
> Boston, fourth August.
>
> P.S. The various editors in the United States are requested to insert the above notice in their journals and their bills shall be paid to their respective agents in this Town."

Austin, who had information that he was to be posted, published a counter statement in the *Independent Chronicle* the same day. It read:

> "Considering it derogatory to enter into a newspaper controversy with one T. O. Selfridge, in reply to his insolent and false publication in the Gazette of this day; if any gentleman is desirous to know the facts, on which his impertinence is founded, any information will be given by me on the subject.
>
> Boston, August fourth. Benjamin Austin
>
> P.S. Those who publish Selfridge's statement are re-

quested to insert the above, and they shall be paid on presenting their bills."

Thus the issue was joined, inevitably to result in bloodshed and tragedy!

Austin, although quarrelsome and combative, was physically infirm. Meeting Welsh the same day, he warned that although he would not "meddle with Selfridge himself" he would arrange for "some person upon a footing with him to take him in hand." At the trial, however, he testified "I had no thoughts of assaulting [Selfridge]; I appeal to God, he would have passed me as safely as he stands here at your bar . . ."

Albeit the publications aroused great excitement amongst the Federalist and Republican adherents, and expectation of a personal conflict prevailed.

Austin's son Charles, who was eighteen years old and completing his studies at Harvard, happened to be in Boston early that same day. He read the offensive posting of his father, and after giving some thought to it, purchased a strong hickory cane, weighing about nine ounces, and well-balanced for striking. Charles was a popular youth and passed the next three hours socializing with his friends. He appeared to them to be calm, cheerful and collected as usual. At 1:00 p.m. he was standing on the south side of State Street conversing with a friend and playing with his cane.

Selfridge had been notified of Benjamin Austin's threat to have him chastized by some bully perhaps "on 'change where he usually went at Midday." Speaking to a friend around noon, he mentioned the possibility of such an attack and asserted that he would defend himself as best he could. Actually, he was accustomed to ride armed with a pistol, for he lived in Medford and travelled home late at night. At 1:00 p.m. that day, he put his pistol in his coat pocket and proceeded to the Exchange to conduct some business.

Suddenly Selfridge came upon young Austin, who immediately moved towards him with his cane uplifted as

if ready to strike. Selfridge drew his pistol and fired at Austin who simultaneously struck Selfridge so viciously that it crushed Selfridge's beaver hat and inflicted on his head a severe contusion of three inches to two in breadth and nearly one inch in depth, accompanied by severe inflammation. At the trial, who made the first movement was never satisfactorily established.

Witnesses for the defense said Austin had struck first. Witnesses for the Commonwealth that Austin had merely retaliated after he had been shot. The ball from the pistol entered Austin's body, passing through his lungs. Despite his wound, Austin continued to flay away at the older man until in desperation, Selfridge threw his weapon at Austin's head—for a moment he even managed to wrest the cane from Austin's hand—when suddenly, bleeding copiously, Austin fell to the pavement and expired before the throng of shocked merchants and passersby who witnessed the affray. Selfridge surrendered to a police officer and was committed to prison.

The impending trial of Selfridge immediately became a cause célèbre. The youth and gallantry of the victim in jeopardizing his life to defend his father's honor under circumstances which hardly justified his murder, and the political feelings of the time fueled the controversy over Selfridge's fate.

The coroner's verdict was wilful murder—but the grand jury, without consulting the court or the attorney-general, found a bill simply of manslaughter. Republicans complained about this decision, attributing it to a number of Federalists on the grand jury. Usually, in cases of this sort, the grand jury would find a bill of murder, because under such an indictment the prisoner could be convicted of the lesser offense of manslaughter if malice could not be established at the trial.

Pleading not guilty to the indictment, and putting himself upon the country, Selfridge was brought to trial for manslaughter on December 23, 1806, before the Supreme Court of Massachusetts. Justice Isaac Parker, a future Chief Justice of Massachusetts and founder of

Harvard Law School, presided, and the foreman of the jury was none other than Colonel Paul Revere. The courtroom was filled to capacity, charged with excitement and emotion. A great legal struggle was anticipated for both prosecution and defense counsel were well-known for their political persuasions and skillful trial advocacy.

Boston had a small bar at the time albeit quite distinguished. Around 1800 it consisted of only thirty-three lawyers, of whom twenty were attorneys of the Supreme Court. Of this number, the two anti-Federalist lawyers appearing for the Commonwealth and the two Federalist lawyers appearing for the defendant were not only the notable leaders of the Massachusetts bar but also highly influential in the state's politics.

Daniel Davis, the Solicitor General, was respected for his book on "Criminal Practice" as well as his ability as a trial lawyer. James Sullivan, the Attorney General, was one of the "immortals" of the Massachusetts Bar and a future governor of Massachusetts.

With the exception of James Sullivan, Samuel Dexter, who appeared as co-counsel for Selfridge, with Christopher Gore, had the largest practice in Massachusetts and his name appears invariably in the important cases published in the early Massachusetts Reports. Dexter's rhetoric was of "majestic grandeur" and Mr. Justice Story wrote of his arguments before the U.S. Supreme Court that "rarely did he speak without attracting an audience composed of the taste, the beauty, the wit and the learning that adorned the city (Washington, D.C.)." He had already been a Congressman and Senator from Massachusetts as well as Secretary of War and Secretary of the Treasury. Gore, that "young, beautiful and excellent Christopher Gore," as he was described by Anna Eliot Ticknor, had been U.S. District Attorney for Massachusetts and was to be a future Federalist Governor of Massachusetts. Popular, ambitious, astute, he was a political figure to be reckoned with.

At 9:00 a.m., Solicitor General Davis rose to open the case for the Commonwealth.

> "Gentlemen of the Jury. I cannot discharge my duty to explain to you the crime with which the defendant is charged without recurring to the authorities which treat on the subject of homicide. It is impossible to understand the crime of manslaughter with which crime the defendant is charged without attending to the subject of homicide at large, and without a previous acquaintance with the crime of murder . . . I shall, therefore, before I state the facts and call the witnesses, ask your attention to several authorities on the law with a view to define the crime, and which you ought in the beginning of the cause to understand . . ."

Then quoting from Blackstone's Commentaries, "that learned author," also Hale, Hawkins and Lord Holt, it soon became clear that a critical question before the court was the extent of the evidence to be admitted. Was proof of malice or verbal provocation competent evidence under the circumstances of the case? For after discussing the law of murder and manslaughter and whether the plea of provocation could be available to the defendent, especially if it be induced by the act of the defendant, "in order to afford him a pretense for wreaking his malice. . . . In all cases of provocation, in order to extenuate the offense, it must appear that the party killing acted upon such provocation, and not upon an old grudge, for then it would amount to murder." At this point Gore interrupted to take issue.

> "The gentleman has stated and laid down principles which I shall oppose; and I may as well take the opinion of the Court now as at any time hereafter. The gentleman has said that on this indictment he shall offer evidence to show there there was that sort of malice which is described in the crime of murder. He has stated that by entering into the conversation and antecedent circumstances, he will be able to prove that there was a previous malice, and that those circumstances, and malice amount to the crime of murder; now the indictment being for manslaughter negatives all idea of malice; he therefore can give no testimony on the ground of malice, as it does not comport with crimes

> stated in the indictment. It is confounding all rules of law, if under this indictment for manslaughter he should attempt to set up a proof of malice."

Then quoting from Hawkins that "Homicide against the life of another amounting to felony is either with or without malice . . . that which is without malice is manslaughter, or chance medley . . ." he asserted: "Therefore, they cannot, under this indictment, attempt, according to any rule of law (that I know of) to prove malice in my client, for it would make a distinct crime, different from that which the defendant is charged."

Davis replied that if, on an indictment for manslaughter, the evidence should show the crime was murder with malice, the jury would be justified in convicting him at least of manslaughter.

Justice Parker agreed with Davis: "If the evidence proves the defendant guilty of a higher crime than that with which he stands indicted: for example if they prove him guilty of murder, it is competent to the jury to find him guilty of manslaughter, for which he is indicted."

Now Dexter rose:

> "I wish to know," he asked indignantly, "what is precisely the question and to what point it is necessary to turn our attention. If it be true, that the whole question before the Court and jury is whether the same evidence can be given on a trial for manslaughter as on an indictment for murder, and it be decided that it can, it appears to follow that the cause is to be tried on principles on which there can be no legal decision; if we are to try on the present occasion for murder, the jury cannot convict nor acquit. It seems to me clear law that no case can be decided, but that which is in issue.
>
> "The indictment is for manslaughter; the definition of this crime is that it must be committed on a sudden, without malice. If malice aforethought be proved, then no part of the definition is subtracted. We cannot have come here to defend what we are not charged with. We have no objection to go into every fact anterior, but we ought to have an

> opportunity to know of this and of what was intended by the prosecution and further we ought to have known of it legally, that is by the indictment. The defendant is not prepared to meet suggestions of malice . . ."

Judge Parker interposed:

> "There is no definite motion before the Court; the observations now made, arise from what the Solicitor General expected to be able to prove. I understand that he expected to show a previous preparation, and that what was done by the defendant was not to protect himself from attack . . . [His] object was to show whether it was merely in defense of himself, or whether there was any previous malice; it appeared to me proper to go into evidence to that effect. I state this, that if from the evidence admitted, and laid before the jury, they should be of opinion that the crime was of a higher nature, the same facts would prove manslaughter was committed . . ."

Then Attorney General Sullivan rose: "If by excluding evidence that would show a previous design," be argued, "they can rid of this indictment, it would amount to saying, if it could be proved that he was guilty of murder, he shall not be guilty of manslaughter."

Davis then proceeded to call the witnesses for the Commonwealth. While the testimony of his witnesses primarily was to the effect of who had acted first, Selfridge in discharging his pistol at Austin, or Austin striking first with his cane, the court allowed the intentions of the parties in entering into the conflict to be testified to. A number of his witnesses swore that the pistol shot preceded any blow. Later, of course, the witnesses for the defense swore to the contrary.

Gore's opening address for the defense was ably done. Gore was concerned that Selfridge not be judged by the jury other than on the merits. For he felt apprehensive about "the various measures taken to pre-occupy the public mind, nor is it surprising that I should be thus apprehensive, when I call to mind the cruel, unjustifiable

and illegal conduct which has been resorted to through the newspapers, to influence the judgment, to inflame the passions, and cause such agitation through the whole community, that its effect might be felt even here, where the rights of all require that justice assisted by the calmest deliberation should above preside . . ."

Gore contended "that every individual has not only the right, but is in duty bound to defend his own life at every hazard and expense of him who assaults it."

Further that as the law allowed Selfridge to own a pistol, the mere possession of the weapon by him at the time of the murder could not be used as evidence of malice, absent anything else. It could not change a justifiable homicide into manslaughter, or manslaughter into murder. "The quality of every act must be according to the intention and design of the agent at the moment. It is by this intention and design that [the jury] must decide the quality of the act, not by the manner of doing it, or its event. So says our law, and so say the laws of God and of reason." Gore followed with quotations from Coke's *Institutes,* Foster's *Crown Law,* Lord Holt, and Blackstone's *Commentaries.*

Gore then concluded:

"Thus, if the person who is threatened says, I will not fight but I will not be beaten, and under these circumstances meets a man who attacks him and in resisting that man, destroys him, it is justifiable self-defense, and that I take to be the law of the case."

After the witnesses for the defense testified to the fear of Selfridge that he would be attacked by some bully in the employ of Austin and that he had not sought any trouble but went to the Exchange on business and he had fired his weapon only after young Austin had struck him with his cane, Attorney General Sullivan made a long and learned argument on the law of the case. Sullivan had been very much involved with other cases at the same term and had only the day before completed another criminal trial. He also had just lost his son and he therefore did not trust to the stenographers to transcribe his speech,

but copied it out himself and read it to the jury. He offered evidence to prove that Selfridge unlawfully had intended to draw Benjamin Austin into mortal combat in order to murder him and that is why he had sent the letters and posted Austin as he did in order to provoke him into such a battle. Selfridge, he maintained, was not in fear of bodily assault.

An interesting procedural situation then arose. Justice Parker surmised that "nothing is proper evidence excepting what took place on the same day or very shortly before; and more particularly that anything which goes to show a previous quarrel with another person, or even with the same person is not proper. The law being clear, that no provocation by words will justify blows. It therefore appears to me that this sort of evidence would not be proper. But as the Government, should I so decide, could not have the question revised in case of an acquittal, I do not wish to decide it alone, but am desirous to request the aid of the Chief Justice, who is in town."

After extended argument on this issue, the attorneys agreed to allow such evidence, provided "the whole transaction can be gone into."—And when asked by Judge Parker, "How far do you mean to extend it," Dexter replied: "So far, as to the origin, as to show that what Mr. Austin said to Mr. Selfridge, was not true." J. Parker then ruled "I am not inclined to give any opinion on the legality of the testimony, but to admit it, as it does not injure the defendant."

As a result, all the antecedent events to the fatal slaying were brought out by witnesses for both sides—especially with reference to Eager's claim against the Republican Committee in charge of the Fourth of July festivities.

After the evidence was in, Gore then proceeded to read a lesson on the law of justifiable homicide and how it applied to the evidence. In the process, he cited as authority such erudite authors in law as Grotius, ("one of the first and brightest ornaments of the age in which he lived in."), Judge Foster, ("one of the ablest judges that ever sat

on a British bench"), Lord Hale, "one of the best and most humane of judges, as well as one of the most devout Christians that ever appeared,"), and Blackstone, ("whose doctrines have never been controverted.").

Samuel Dexter, closed for the defense, speaking the greater part of the morning session on Christmas Day. He was unusually eloquent, minutely examining the whole of the evidence and the applicable law. Recognizing the political implications of the case, he subtly argued "I am fortunate enough not to know, with respect to most of you, to what political party you belong. Are you Republican Federalists? I ask you to forget it; leave all your political opinions behind you . . ." He similarly conjured those members of the jury who were Democratic Republicans.

Sullivan then closed for the Commonwealth. He asked the jury not to be influenced by the great crowd that was in the court during the trial, stating that,if it represented party spirit, it had no relevance to the events of the case.

"The question before you," he reminded the jury, "is this: Has the Government produced evidence to convince you beyond a reasonable doubt that the defendant killed Charles Austin in the manner and form as set forth in the indictment. . . . If the defendant had not written the advertisement, this quarrel would not have taken place—it was that which produced it."

Justice Parker was brief in charging the jury. As he noted to the jury: "This most interesting trial has already occupied four days and you must by this time be nearly exhausted." His explanation of the law was succinct and knowledgeable, relying on the Boston Massacre Trial of 1770, in which Judge Trowbridge, "laid down and illustrated with great precision and clearness, every principle which can come in question in the present trial."

> "First. A man who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own life or prevent the intended harm, such as re-

treating as far as he can, or disabling his adversary without killing him if it be in his power.

"Secondly, when the attack upon him is so sudden, fierce and violent, that a retreat would not diminish but increase his danger, he may instantly kill his adversary without retreating at all.

"Thirdly. When from the nature of the attack there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended."

Recognizing that the third principle could be contested, he then directed the jury that the question it had to decide was whether according to the facts shown at the trial any reasonable, legal justification or excuse had been proved. "Whether the killing were malicious or not, is no further a subject of inquiry than that if you have evidence of malice, although the crime charged does not imply malice, it may be considered as proving this crime, because it effectively disproves the only defense which can be set up, after a killing is established."

After analyzing the testimony of the witnesses as he ascertained the facts, he laid down the "law of the land, that unless the defendant has satisfactorily proved to you that no means of saving his life, or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power—he has been guilty of manslaughter, not withstanding you may believe with the grand jury who found the bill, that the case does not present the least evidence of malice or premeditated design in the defendant to kill the deceased or other person."

On the issue of provocation, he charged the jury that "if a man, for the purpose of bringing another into a quarrel, provokes him so that an affray is commenced, and the person causing the quarrel is overmatched and to save himself from apparent danger kill his adversary, he would be guilty of manslaughter, if not of murder, because the

necessity being his own creating, shall not operate in his excuse!"

The jury retired and immediately agreed upon a verdict of NOT Guilty and returned with it into court at 4:00 p.m. on December 26, 1806. There was little doubt at the time, that justified as Selfridge was in killing Charles Austin, still the overwhelming Federalist persuasion of the jury had helped considerably, in reaching this verdict, perhaps even more than the advocacy of Dexter and Gore. Selfridge noted in "A Correct Statement of the Whole Preliminary Controversy between Tho. O. Selfridge and Benj. Austin," which he published in 1807, that "Soon after the acquittal, mobs and riots infested the town, burning effigies, libelling jurors and judges, and threatening to murder, etc. These outrages were anticipated by judicious men, in consequence of the wanton publications in the Chronicle and other democratic newspapers."

The Inns of Court

The Beginnings of English Legal Education

No English institutions are more distinctively English than the Inns of Court—unchartered, unprivileged, unendowed, without remembered founders, these groups of lawyers formed themselves and in the course of time evolved a scheme of legal education; an academic scheme of the medieval sort, oral and disputatious. For good and ill that was a big achievement; a big achievement in the history of some undiscovered continents.

This appraisal by Frederic W. Maitland epitomizes one of the most fascinating developments in the history of English legal institutions—the rise of the Inns of Court—a story as unique as their origins.

It is known that the clergy monopolized all literary pursuits prior to the reign of Edward I (1272-1307). As a consequence ecclesiastical persons studied and chiefly administered the law. The nobility and gentry confined their activities to the practice of arms. In the main, the justices of the King's court as well as the itinerant judges were bishops, abbots, deans, and canons in Cathedral Churches. Up to the time of Henry VII (1485-1509), the chancellor was usually a clergyman.

During the reign of Henry III (1216-1272), the Church noted with apprehension the mounting criticism of its members resulting from the venality of the judiciary. To remedy this situation the clergy were interdicted by ecclesiastical canon from the practice of law.

The lay judges who followed, however, were no better than their predecessors. A commission of inquiry and redress issued by Edward I reported to Parliament that of the twelve common law judges of that day, ten had been convicted of taking bribes and falsifying records. Based on this report a second commission was issued by Parliament addressed to the Lord Chief Justice of the Court of Common Pleas, one of the two judges, incidentally, cleared by the investigation, and his colleagues, granting them authority to choose and appoint seven score attorneys to practice in the courts, and a number of students to study the principles of the common law. It was not deemed necessary for these students to be instructed in Roman or ecclesiastical law, for those subjects were being taught at Oxford and Cambridge.

It is not known exactly when any of the Inns was founded. Sir Frederick Pollock was of the opinion that they were all established about the same time. Among the well-known Paston letters, there is a letter from a serjeant written in 1454 in which he comments "In Gray's Inn wer I was a felow." The establishment of the Court of Common Pleas in Westminster Hall (resulting from Magna Charta) attracted practicing attorneys and law students to its vicinity. Soon separate colonies of lawyers and their students took up residence between the King's court at Westminster and the City of London, and the Inns of Court began to evolve in that neighborhood.

In the reign of Edward I, Henry de Lacy, gave his town residence to a group of lawyers and their students, thus providing a home for the *Honourable Society of Lincoln's Inn*—the first and oldest of the Inns of Court. Soon thereafter the *Inner Temple Inn* and the *Middle Temple Inn* were established by the acceptance of a lease from the Hospital-Knights by the *Legal apprenticii of Thavies—Inn*,

an ancient inn of Chancery. In the same period came the founding of *The Society of Gray's Inn*, when Lord Gray de Wilton granted a lease of his town house to another group of lawyers. The Inns of Court admitted only the sons of the nobility and upper classes. These four historic Inns have always been considered as "the four equal and honorable societies," none outranked by any other.

In addition to the Inns of Court there were the Inns of Chancery (so called probably because they attracted clerks who studied the making of writs—mainly a function of the chancery officers or cursitors), and those of the Courts of Common Pleas and King's Bench. Dugdale explains in his *Origines Juridiciales* that the Inns of Chancery derived their name from the ancient *hospicia* for the clerks of chancery. Actually the Inns of Chancery served as a preparatory school for younger students, as well as for teaching writ draftsmanship. Many students entered the Inns of Chancery before being admitted to the Inns of Court. "Quia students, etc.," says Fortescue, "because the students in them are for the greater part young men learning the first elements of the law; and becoming good proficients therein, as they grow up, are taken into the greater hostels, which are called Inns of Court."

The Inns of Chancery were attached to an Inn of Court and remained under its jurisdiction. Under the *Inner Temple* were Clifford's, Clement's, and Lyons; under the *Middle Temple*, Strand and Mew; under *Lincoln's Inn*, Furnival's and Thavies'; and under *Gray's Inn*, Staple and Barnard's. In addition to these Inns there were others which carried on independently, such as the Serjeant's Inn and the Dane's Inn.

The Inns were obviously flourishing in the 15th Century. Fortescue advises us that there were then "four Inns of Court belonging to the lawyers university, each containing two hundred persons and ten Inns of Chancery and in each of them one hundred persons."

Each Inn was organized as a society—unincorporated and without any legal power over its members. They were subject, however, to their own strictly enforced rules and

regulations. The most severe penalty was expulsion, which was greatly dreaded, as once expelled admission would be denied to the other Inns.

By the reign of Richard II (1377-1399), the members of the Inns were categorized into three types of *apprenticii*. First there were the students—then there were the teachers, and finally the *apprenticii ad legum*, who were granted the privilege of practicing in court by the judges. With the greater use of English adopted in the courts during the Tudor period, the name *apprenticii* was replaced by "barrister."

The teaching process followed a set pattern. It was characteristic of the medieval period utilizing the analytical and dialectical method. Usually the beginning student entered an Inn of Chancery at the age of 18, where he was taught the rudiments of the law for about two years. He then was graduated to the Inn of Court to which his Inn of Chancery was attached, where he became an expert on "bolting." "Bolting" consisted of answering legal questions put to him by a bencher and two barristers who sat in private judgment on him. (Benchers were the seniors of the Inn and governed the society.) After he became proficient in the art of "bolting" he joined the "mooting" or public arguments. There he impleaded and argued publicly doubtful cases and questions called "Moots." Four or five years of this training made him eligible to become an *inner barrister*. After eight years standing on the books of the Inn of Court he became an *utter barrister*. As an *utter barrister* he would argue cases while sitting uttermost on the forms of the benches, called the bar. An utter barrister was therefore "called to the bar." From this class, the Readers or lecturers were chosen for the Inns of Chancery attached to the particular Inn of Court. Upon achieving the rank of *utter barrister*, he still had to wait another three years before the court permitted him to practice. Actually 12 years training was required, and a barrister could not expect to practice law in those days before he was 30 years old.

Students could not advance academically without

passing some rather severe examinations. The process of academic advancement could be accelerated, however, if the student showed great merit and ability. Thus, Sir Edward Coke became a Barrister after only six years standing.

Lectures were delivered by Readers who were given about six months notice to prepare them. A lecture ran for 3 weeks and 3 days in each term and was based on a legal subject chosen by the Reader. Some Readers failed to complete their readings and were fined. There is a record in *Gray's Inn* of a Mr. Ellys who was fined £10 for reading too short in 1593. The Reader also presided over the moots. Most important of all, he was responsible for the entertainment and food of all who visited the Inn during the reading. This could be quite expensive, for many of the judges, officers of state, nobility, and sometimes the royal family would attend. On one occasion the cost to a Reader amounted to more than £1000, a rather heavy expenditure for the 17th century. As the reading became too burdensome an expense to bear, so many nominees refused to accept the honor that it eventually was discontinued. Special lectures are now established in the four Inns on various aspects of the law and are delivered by the benchers.

Some of these readings, recognized as classic commentaries, were studied for years after their delivery. A few are still occasionally referred to, such as the reading by Sir Thomas Littleton on the "Statute de Donis Conditionalibus" and the one by Sir Francis Bacon on "Uses."

The Inns of Court were also the centers for recreation and play. Characteristic of the Tudor and Renaissance periods, recreation took the forms of plays, revels, and masques. Intellectual and social stimulation was the theme, rather than physical or athletic encounter. Singing, acting, and dancing were considered "polite relaxations" in which the most dignified members of the bar could participate without loss of face. The Benchers encouraged participation by the students in these frivolities, considering them excellent opportunities for cultivating

their rhetorical powers, strengthening their voices, elevating their literary taste, and adding grace to their movements.

"Revels" were usually held on festival occasions, especially at Christmas time. The "grave and reverend bench" would sponsor a performance which revolved around a mimic court presided over by a mock King or Prince and his entourage. The Chief of Revels was called "The Prince of Purpoole" at Gray's Inn, "Prince de la Grange" at Lincoln's Inn, "Prince of Sophie" at the Inner Temple, and "Prince d'Amour" at the Middle Temple. Customs and high personages were mimicked in extravagantly staged productions at fantastic cost, and often the King and his court as well as officers of state would attend. Masques or plays were similarly produced, sometimes as a joint venture by all four Inns. During the reign of Charles I, the revels and masques were so lavishly produced and at such enormous cost that Sir Simond d'Ewes felt it necessary to express his shock at the expenses involved. "I began seriously to loathe it," he wrote, "though at the time I conceived the sport of itself to be lawful." One masque presented by the four Inns jointly at Whitehall Palace on Candlemas night in 1633, a display of affection and duty to Charles I and his Queen which involved dancing, speeches, music, and scenes, cost more than £21,000 to produce. This masque was so enthusiastically received, that it was repeated by royal request.

The masques were influential, too, in promoting the development of the English drama. John Manningham, a barrister of the Middle Temple wrote in his diary on February 2, 1602, that Shakespeare's *Twelfth Night* was performed there at the Reader's feast on Candlemas day. Other contemporary dramatists also arranged for their plays to be performed at the Inns of Court.

The inmates of the Inns of Court had a reputation for disorderly conduct. They were noted for continually fighting with the burghers of London and generally causing disorder. The situation became so difficult for a time that the Star Chamber in 1517 suggested to the Benchers "that

they should not suffer the gentlemen students to be out of their houses after six o'clock at night without very great and necessary causes, nor to wear any manner of weapon!" Mild disorder appeared to be prevalent on many occasions in the various Inns. A really wild affair would ensue on "hunting nights" when dogs would chase a fox or a cat in the hall, encouraged by the shouts and urgings of the onlookers.

Despite it all, the inmates of the Inns managed to study, attend court, and develop into great lawyers and magnificent judges. When we reflect on our indebtedness to those four honorable societies, we can appreciate Thackeray's comment in the first volume of *Pendennis*:

> *I don't know whether the student of law permits himself the refreshment of enthusiasm, or indulges in practical reminiscenses as he passes by historical chambers* [*in the Middle Temple Inn*] and says, "Yonder Eldon lived; upon this site Coke mused upon Lyttleton, here Chitty toiled . . . But the man of letters can't but love the place which has been inhabited by so many of his brethren."

SERJEANTS-AT-LAW

The Serjeant-at-Law

The Order of the Coif

In the winter term of 1605-1606, there was much speculation in England concerning the health of Chief Justice Gawdy of the Court of Common Pleas. He had been absent from the Court and rumor had it that his successor would be the brilliant Attorney General, Edward Coke. As feared, the illness of the Chief Justice proved to be fatal and he died late in the Spring of 1606.

Coke reacted with characteristic assurance. He was convinced that his thirteen years of outstanding service to the Crown as Attorney General warranted his appointment to the bench. Aware, however, of the political implications and desiring to forestall any unnecessary difficulties, he advised Sir Robert Cecil, the Secretary of State, of his interest in the position and then added the following incisive note:

"I am bold to inform you what course I must take. First I must be made Serjeant, which may be on Saturday next, and the Chief Justice on Monday. There must be a writ (for which my Lord Chancellor will have warrant) returnable on Saturday to call me to be a Serjeant, and a warrant for the patent of the office of Chief Justice of the Common Pleas. Hereof I presume to inform you, lest if others should complain, blame might be imputed to me."

This incident in the life of the great jurist sheds light on a distinctive English legal institution—the Serjeant-at-Law and the "venerable" Order of the Coif. Although Coke was one of the leaders of the English bar at the time, and highly qualified, he was well aware that his creation as a Serjeant-at-Law was a sine qua non to an appointment on the bench. He also understood why he had failed to attain that requisite position—and therein lies a tale.

The Order of the Coif was an exclusive association of lawyers whose membership was restricted to the distinguished barristers known as Serjeants-at-Law. It has been said that the Order of the Coif "came with the Common Law of England." Although its origins are clouded in the haze of antiquity, it is known to have existed shortly after the Norman Conquest in 1066.

The manner in which the Order evolved is closely associated with the development of the Common Law. It will be recalled that land was held from the Crown by various tenures under the feudal system. In return, certain holders of land were required to offer special services to the King. The services usually were of a military nature, but at times could also pertain to the administration of justice—as in the office of Coroner, Sheriff, Keeper of the Peace. Such tenure was considered to be by Serjeantry, and the holders were known as Serjeants. Some offices granted by the sovereign had no land attached to them, but the occupant was permitted to collect fees. These usually pertained to the law and were known as *Serjeantry in Gross*, or at large, or *Serjeanterie Sans Terre*.

After the Norman Conquest, the average Anglo-Saxon concerned with a law suit was completely confounded by the Law-French used in the Courts and the intricate system of pleading introduced by the Normans. He therefore turned to a skilled lawyer who was familiar with pleading, or *Conter* as it was called. The Law-man became known as a *Counter*. As the *Counters*' business flourished, the Crown found it advisable to assume control over it by appointing the *Counters* as *Serjeants in Gross*. They became known as *Servientes regis ad legum*, or King's

Serjeants-at-Law. After a while the word *regis* was deleted, except for those few who served the King directly as his legal counsel. From time to time, these pleaders were also called *Serjeant Counters, Narratores Banci, Brothers of the Coif, lagemanni, men of Law* or *loiers*.

From the beginning, the Serjeants of the Order of the Coif played an important role in the development of English law and its institutions. Specifically, however, they are closely associated with the history of the Court of Common Pleas. Plucknett believes that the medieval law reports, The Year Books, "are peculiarly and intimately connected with the order of Serjeants" and that actually they were prepared under their direction and for their use.

In the time of the Normans, Englishmen looked to the *Aula Regis*, or Supreme Court, for ultimate justice. This judicial body was simply the King, acting as judge with the guidance of his chief aides. The three old Common law courts emerged eventually from the *Aula Regis*. They became known as the Court of Common Pleas, the King's Bench and the Exchequer. The Court of Common Pleas had jurisdiction over actions real and personal between subjects; the King's Bench settled suits concerning the King and the realm; and the Exchequer considered revenue matters. By means of fictions, the King's Bench and the Exchequer later assumed jurisdiction in certain actions involving subjects. But in the main, the important and most lucrative litigation for many years was settled in the Court of Common Pleas. There the basic principles of common law were developed, particularly in real property. For this reason Coke described the Court as "the lock and key of the Common Law."

And now we become aware of the Serjeant's importance. From the Court's early beginnings up to the middle of the 19th century, Serjeants-at-Law had the exclusive right of audience. They were considered next in rank to the members of the Bench, and the Justices of the Court were always selected from the Serjeants-at-Law. Later, all the Judges of the common law courts at Westminster were chosen from the Order of the Coif.

Thus we find the judges and the Serjeants in forming

the Order of the Coif establishing a unique relationship and a most highly influential group. Holdsworth states that to become a Serjeant was a more solemn and important step than to become a judge—for once a Serjeant a judgeship was most assured to follow. This close association is evident in the Year Books, where we find judges referring to Serjeants from the bench as "Brother." Cowell in his Law Dictionary, notes that the judges heard the Serjeants in court "with great respect." The Year Books also reveal that the judges would even ask the Serjeants for their opinion in a difficult case. Sometimes the Year Book reporter would comment on the Serjeants' opinion rather than the judges'. "Judgement is pending," says the reporter, "but all the counters say the writ was invalid." In another case a demandant was nonsuited "because all the Serjeants agreed that the writ could not be supported in this case."

To be created a Serjeant thus became a cherished and much desired honor. It is significant too that a Serjeant was "created" rather than appointed or made—for it placed him in the same class with Peers. The monopoly they enjoyed in the business of the Court of Common Pleas, especially the precedence they enjoyed—to be heard before all other lawyers, even the King's Attorney General—brought them tremendous personal incomes. Their fees invariably were higher than (often double) those of other members of the bar. Chief Justice Fortescue, who during his exile in Flanders between 1463 and 1471 wrote the celebrated "De Laudibus Legum Angliae," commented, "Neither is there any man of lawe throughout the universal world which by reason of his office gaineth so much as one of these Serjeants."

Serjeants were highly influential in the House of Commons and during the reigns of Edward VI, Elizabeth and James I, the speaker was invariably a Serjeant-at-Law. It was Serjeant Bradshaw who presided over the trial of Charles I. Eventually the Lord Chancellors were also chosen from the Order of Coif.

The Call to the Coif, or Creation of Serjeant-at-Law,

was considered a solemn occasion. Only the most learned and successful barristers were selected and the number at a Call consisted usually of seven or eight. The need for a successful practice was obvious, for the ceremony became a very costly affair. The choice of names was made by the Chief Justice of the Common Pleas, with the consent of all the Judges. These names were then submitted to the Lord Chancellor, who by royal writ of summons under the Great Seal ordered these select few to assume the degree and state of a Serjeant-at-Law (*ad statum et gradum servientes ad legem*), or be heavily penalized. Selden explains the words *status et gradus* in the Serjeant's writ as meaning an "ancient state and degree of title, state, and dignity." The degree of Serjeant-at-Law was more important than a mere academic degree. Fortescue noted that "there never were degrees of *Bachelor* or *Doctor* conferred in the Inns of Court, as in the civil and canon law by the universities; but there is there conferred a degree, or rather an honorary estate, no less celebrated and solemn called the Degree of a Serjeant-at-Law."

Holdsworth adds that the state and degree of Serjeant was equivalent to a public office, which is borne out by the oath of office he took:

"You shall swear well and truly to serve the King's people as one of the Serjeants-at-Law, and you shall truly counsel them that you be retained with after your cunning; and you shall not defer nor delay their causes willingly, for covetness of money or other thing that may turn you to profit; and you shall give due attendance accordingly."

The more distinguished of the Serjeants-at-Law later were created King's Serjeants by letters patent. The King's Serjeants represented the crown as its legal advisor and public prosecutor and were the predecessors of the present Attorney General and Solicitor General. They were granted an annual retainer as compensation for their work. Their oath of office was "well and truly to serve the King and his people as one of his Serjeants-at-Law."

The ceremonies attending the creation of a Serjeant

involved a curious combination of events. First the Serjeant-to-be was entertained at a public breakfast by the Inn of Court of which he was a Bencher. Tradition called for a retaining fee to be presented to him there by the members of the Inn, usually consisting of a gold or silver purse containing about 10 guineas. As he prepared to leave for the last time, the chapel bell was tolled signifying that from then on he was no longer a member and he could return to the Inn by invitation only. Then with great pomp and circumstance, wearing the official dress of a Serjeant, and attended by his "colt," he proceeded to the chambers of the Lord Chancellor. The "colt" was a young professional friend, whose presence was also required by tradition. As he walked in *pone* behind the Serjeant, it has been said that the word "colt" is a parody on that Latin word. The Serjeant was subjected to a lengthy lecture on his duties by the Lord Chancellor, and then the Monarch's writ conferring the rank upon him was read. Thereafter the oath of allegiance was administered, and as he kneeled the white coif of the order was placed on his head.

Fortescue described the coif as the "principal and chief insignment of habit wherewith Serjeants-at-Law on their creation are decked." Originally it was made of *white lawn or silk*, which fit very closely on the Serjeant's head—more like a close-fitting cap. Pulling notes that the word Coif is old and spelled in many ways. (Coif, Coyffe, Cuphia, Coifea, Quoiffe, quaif, etc.) It was a term used also to describe the iron skull-cap of *coif de fer* worn by the military in the 13th century, the cap of chain or *coife de mailles* of the Knight, and the head covering or *Coife de toile* worn under the Knight's helmet.

The right to wear the Coif signified a great honor suggesting rank and dignity. The Serjeant was not permitted to doff it under any circumstance unless discharged from the order. Fortescue adds: "Neither the Justice nor yet the Serjeant shall ever put off the quoiffe, no not in the King's presence, though he be in talk with his Majesty's highness."

It has been suggested that the origin of the Coif was

ecclesiastical—to cover the tonsures of churchmen who had been banned from practicing in secular courts in 1217. But Pulling objects strenuously to this theory, maintaining that the old coif was in fact an honorable and distinctive head dress corresponding to the helmet of knighthood.

As fashions changed over the years, so did the appearance of the coif. In the reign of Elizabeth I, the Serjeant wore a small skull-cap of black silk or velvet on the top of the coif. The familiar portrait of Lord Coke bears this out. When wigs became fashionable, the Serjeant's rank was suggested by a round patch of black and white lawn worn on top of the wig, the white representing the ancient white coif, and the black the cap which had been worn on it. It is also believed that the "black cap" worn by judges in England today when sentence of death is imposed, originated with the purpose of veiling the coif on so sorrowful an occasion.

An expensive tradition continuing to the 19th century was the Serjeant's gift of gold rings to the Sovereign, the Judges, and other officials. Fortescue states that "every Serjeant shall make presents of gold rings to the value in the whole of £40 (at least) English money. I well remember when I took upon me the state and degree of a serjeant-at-law that my bill for gold rings came to £50." Commenting in his 1663 edition of Fortescue's "De Laudibus" on this part of the ceremony, Waterhouse wrote that "Forty pounds is near as much as two hundred pounds now." A formula arose for the value and appearance of the ring according to donee. The King's ring had to be worth 26 shillings 8 pence; the Chief Justice's or Lord Chancellor's, 20 shillings; the Master of the Rolls, one mark, etc. By the 19th century the list of donees had been cut down considerably, until it settled on 28. The Serjeant's "colt" handed a ring to the Lord Chancellor for delivery to the King and also presented him with his own ring. The colt kept one for himself. The other rings were later distributed by the Serjeant's goldsmith. Beginning with Elizabeth's reign, mottoes or "posies" were engraved

on the ring, usually complimenting the reigning Sovereign in Latin. In the ninth year of George II, 14 new Serjeants gave 1409 rings, valued at £773.

A humorous situation is recorded in I Modern Reports 9 (Case No. 30) in the form of a memorandum:

"Seventeen serjeants being made the 14th day of November a day or two after Serjeant Powis, the junior of them all, coming to the King's Bench Bar, Lord Chief Justice Kelynge told him, that he had something to say to him, viz. that the rings which he and the rest of the Serjeants had given weighed but eighteen shillings a piece; whereas Fortescue, in his book De Laudibus Legum Angliae says, The rings given to the Justices and to the Chief Baron ought to weigh *twenty shillings* a piece; and that he spoke not this expecting a recompense, but that it might not be drawn into a precedent, and that the young gentlemen there might take notice of it."

What has happened to the many rings given by Serjeants over the years is a matter of conjecture. An anecdote told by Mr. Serjeant Sleigh is of some help in this respect. He related that in 1868, when he was arranging with his goldsmith to order rings on his call, a lady entered and offered a box of many rings for sale saying "We have no use for them, you know; they were given to my dear papa when he was Lord Chancellor. "Papa" was the well-known Lord Campbell, author of "The Lives of the Chief Justices."

Costly as the rings were, it is interesting to note that it was but a minor part of the total cost of being created a Serjeant. For this reason only those members of the Bar were called who had "an estate to support the dignity and equipage of it."

After the rings had been presented the Serjeants went in procession to Westminster and "counted" in a real action in the Court of Common Pleas." This was done in Law-French until Lord Hardwicke "counted" in English. In medieval times, the procession ended at St. Paul's where the Serjeant worshipped at the Shrine of Thomas à Beckett. There he was allotted a *parvis* or pillar, where he

was allowed to meet his clients and offer legal advice. The prologue to the Canterbury Tales by Chaucer describes:

> "A Serjeant of the Law, wane and wise,
> That often hadde ben at the parvis . . ."

This practice of assigning a parvis to a Serjeant continued on until St. Paul's was destroyed in the Great Fire of 1666.

The new serjeants then joined the Serjeants' Inn in Chancery Lane where they formed a close association with their "brother" judges and serjeants. The Serjeants' Inn was very much like a private club. Here the serjeants and judges dined together on the first and last days of a term. In later years the fee of admission to the serjeants' mess amounted to £350. If the serjeant was admitted with the purpose of elevating him to the bench, he paid £500. Every member also paid £1500 a year as Commons. As the members rarely amounted to more than forty, the order of the Coif remained an extremely select, influential, and private group. In contrast, the Inns of Court to which the other members of the bar belonged became public institutions.

One other feature of the serjeants' call merits comment. On his appointment, a feast was served that lasted seven days. It became a sumptuous affair, and the records indicate that the King and Queen and members of the Court were often invited. At one of these celebrations in 1531, in which eleven serjeants were called, the following were consumed: "twenty-four great beefes, one hundred fat muttons, fifty-one great veales, thirty-four porkes, swans, larkes, the capons of Kent, the carcase of an ox from the shambles," and many other courses. It is horrendous to contemplate the great flow of wines, liquor and beer that must have been guzzled as well. The expense was tremendous, and the new serjeants paid the bill. The feasting was later reduced to one day and abandoned completely after 1758.

The serjeant's wardrobe was very colorful and varied

on different occasions. He wore black cloth in term time, purple on Saints' days, and black silk when he tried a case before a jury. He also had a scarlet gown for state functions. In earlier periods his robes were trimmed with fur. As Chaucer noted:

"For his science, and for his high renoun,
of fees and robes had he many on."

Thus we can see why Coke found it necessary to write his letter to Sir Robert Cecil. He had first to be created a Serjeant-at-Law before he could be appointed to the Bench. He knew too that he had been denied that esteemed position by Elizabeth and James over the years precisely because they feared he would become eligible for a judgeship, and they needed him as Attorney General. Shortly after he was created Serjeant, Coke was appointed Chief Justice of the Court of Common Pleas.

The esteemed and "venerable" Order of the Coif suffered several set backs in the 18th and 19th centuries which eventually caused its decline and lamented demise. The rise in importance of the King's Counsel, a rank which was granted precedence over the Serjeant, the opening of the Court of Common Pleas to the whole bar indiscriminately, and the Judicature Acts which removed the requirement of appointing judges from the ranks of the Serjeant-at-Law made it clear that the Order had lost its significance. The last two Serjeants to be coifed were Field and Lindley in 1875. The dramatic end occurred in 1877 when there were 22 judicial and 17 practicing Serjeants. The Serjeants agreed to dissolve the association and sold their Inn at public auction for £57,100, dividing the proceeds among themselves. The handsome portraits of Serjeants which used to hang in Serjeants' Inn now can be viewed in the National Portrait Gallery.

The last survivor of that ancient Order of Coif, Baron Lindly, Lord of Appeal, died in 1921. He happened to be a descendant in the female line of the Great Chief Justice, Sir Edward Coke.

Lord Mansfield and the Common Law

Father of Modern Commercial Law

During a lull in the conversation at a brilliant dinner of judges and counsel in Serjeants' Inn Hall around 1760, Mr. Wilbraham gave a toast. Raising his glass to an elegant gentleman of medium height, he exclaimed, "Sirs, I give you the glorious uncertainty of the law!"

As the assemblage responded with a great stir of approval, the recipient of this honor gracefully bowed from his seat. The reason for Mr. Wilbraham's toast and the story of the man who was honored that day constitute another fascinating chapter in the development of the common law—for the man was William Murray, then Baron of Mansfield, Lord Chief Justice of England, and the toast was an allusion to his tendency to overrule and change long-established principles of law as well as introduce innovations into the practice of the Court.

The late Chief Justice Arthur T. Vanderbilt must have recognized him as a kindred soul. "Lord Mansfield," he wrote in *Men and Measures of the Law*, "has fascinated me since the first day I encountered him in my law school course on contracts. . . . I am never quite certain whether I am moved more by his opinions or by the dazzling achievements of the man himself in spite of seemingly insuperable obstacles."

It has been said of Lord Mansfield that his fame rests upon his efforts to expand the law of England—especially in the field of commercial law. "Mansfield, day by day, and stone by stone," commented Lord Shaw, "was building up the noble fabric of the common law of England." But there was more to Lord Mansfield than his contribution to English law—he achieved great success not only as a lawyer and advocate, but as a jurist and politician as well.

Born into the family of a poor Scottish peer in 1705, William Murray showed great promise as a scholar from his early youth. After an impressive career at Christ Church, Oxford, where he obtained a B.A. and an M.A., he was called to the Bar at Lincoln's Inn.

His training in Latin was profound and served him in great stead in his later years as a jurist. At Oxford, he became celebrated for his eloquence as a public speaker. As part of his preparation for the practice of law, he studied the style of all the classic orators.

While studying law at Lincoln's Inn he enriched his background by reading the great historians and delving deep into ethics and Roman civil law. This preparation greatly influenced his judicial thinking in later years, for he became convinced that the true basis of law was the Roman system of jurisprudence. He reveled, too, in the writings of the French jurists, for there he could find a practical demonstration of how Roman law principles could be integrated into the jurisprudence of a country. He also read the Greek and Latin classics and continued this program to his last days.

As a barrister, his eloquence in arguing cases before the House of Lords made him a marked man. The fall of Walpole's government gave him his opportunity to advance politically. He was made King's Counsel and then appointed Solicitor General to Lord Wilmington's government on November 27, 1742. He was elected to Parliament and represented his constituency until his elevation to the bench in 1756. In Parliament his eloquence and his ability to stand up to the elder Pitt, promoted him to the position of leader of his party. At the same time he acted

as the government's Law Officer. In 1754 he became Attorney General.

Lord Campbell, whose vitriolic pen rarely praised any leading English jurist, begrudgingly had to admit that it was "the longest and most brilliant Solicitor Generalship in the annals of Westminster Hall." As an advocate, Mansfield was unsurpassed in the courtroom, his eloquence and masterly arguments overwhelming his opposition.

Everyone who heard Mansfield in court could not but comment on his ability as an orator. Edmund Burke's evaluation can well be noted by the lawyer today:

"He had some superiors in force; some equals in persuasion, but in *insinuation* he was without a rival. *He excelled in the statement of a case. This, of itself, was worth the argument of any other man.*"

On November 8, 1756, William Murray was sworn in as Chief Justice of the King's Bench and created Baron Mansfield. Twenty years later he was elevated to an earldom. The Chief Justiceship had long been his goal, and he turned down the Prime Minister's offer of The Duchy of Lancaster for life and a pension of £6000 a year if he would stay in the House of Commons and continue his efforts on behalf of his party. He remained on the bench for more than 30 years, resigning on June 4, 1788. During this period he impressed his judicial thinking on the common law to such an extent that its effect abounds in our jurisprudence today.

Lord Mansfield rendered thousands of judgments while on the Bench, but only two of them were ever reversed. "Lord Mansfield," said Lord Thurlow, "was a surprising man; ninety-nine times out of a hundred he was right in his opinions or decisions; and when once in a hundred times he was wrong, ninety-nine men out of a hundred could not discover it. He was a wonderful man!"

Mansfield commented once, "I never give a judicial opinion upon any point, until I think I am master of every material argument and authority relative to it." His decisions are published in the reports of Burrow (1756-1772),

Cowper (1774-1778), Sir William Blackstone (covers cases in the King's Bench from 1746 to 1779), Douglas (1778-1784), and Durnford and East (1785 to the date of retirement, 1788). It is interesting to note that Burrow, probably at the insistence of Mansfield, was the first English reporter to prefix to each case reported a statement of the facts and issues apart from the opinion of the court as well as the arguments of counsel, the opinions of the judges, and the judgment of the court. Modern court reporting actually began with the advent of Burrow's Reports.

Many anecdotes have been related of Mansfield's thoughts on the judicial function. He once advised a friend who had been appointed to the governorship of Jamaica, which office was also concerned with judicial appeals, to decide cases as his common sense dictated; but never to give a reason for his decision. "Your judgment will probably be right," he cautioned, "but your reasons will certainly be wrong." Once, the tables were turned on him. A Mr. Dunning was developing a legal argument, when Lord Mansfield interrupted, "Oh, if that be law, Mr. Dunning, I may burn my law books." To which, the reply came immediately: "Better read them, my lord."

As a judge, Mansfield was a fascinating and indomitable figure, who reacted with sophistication and resolution to the problems judges inevitably encounter.

The John Wilkes outlawry case of 1768 is illustrative in this context. Wilkes, the agitator, reformer and pamphleteer, escaped to France to avoid a seditious libel action brought against him in Mansfield's court, and as a result, he was outlawed. Wilkes avoided the suit because he thought his enemies were so powerful politically that he would be sentenced to life imprisonment. Four years later, he decided to return to England and confound his enemies by announcing his candidature for Parliament. After being elected to Parliament, he then surrendered to his outlawry. The excitement that ensued was unparalleled. How would Mansfield respond to the political pressures and intimidations to finally eliminate Wilkes from the political scene? Instead of sentencing him to life,

Mansfield reversed the judgment of the King's Bench of outlawry and explained:

"I honor the King and respect the people, but many things acquired by the favor of either one are in my account objects not worth ambition. I wish popularity; but it is that popularity which follows not that which is run after; it is that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. I will not do that which my conscience tells me is wrong upon this occasion to gain the huzzas of thousands, or the daily praise of all the papers which come from the press. I will not avoid doing what I think is right though it should draw on me the whole artillery of libels—all that falsehood and malice can invent, or the credulity of a deluded populace can swallow."

He then sentenced Wilkes to the comparatively light penalty of £500 and a year's imprisonment.

One of the two Mansfield opinions reversed on appeal was the famous case of *Perrin v. Blake, 1 W. Bl. 672, 96 Eng. Reprint 392 (1769)*. Here, the well-known Rule in Shelley's case was involved. Mansfield held that the case was within the Rule, but refused to apply it. The appeal to the Exchequer chamber stirred the nation. People took sides and were known as Shelleyites and anti-Shelleyites. Pamphleteers took up the issue and Junius indignantly alleged that Mansfield was attempting to subvert the Laws of England.

Lord Mansfield's greatest achievement on the bench was to assimilate the law merchant or *Lex Mercatoria* into the body of the common law. He was well prepared to undertake this extraordinary feat, for as we have seen, he had acquired a vast background in civil law as part of his law studies at Lincoln's Inn. The manner in which he accomplished it was most interesting.

The practice before Mansfield's time was to employ special juries composed of merchants to decide commercial cases and to apply the customary law of merchants to the issue of the case. In this respect, therefore, the jury was the trier not only of the facts but of the law, too. No body

of law or system of general rules could be developed under these circumstances for each case was considered on its peculiar facts, and precedent was not a factor. Mansfield decided that it was without the province of the jury to determine the customs of the law merchant, if firmly established. Rather he applied them to the facts of the case as general rules of law. If not firmly established as a custom of the law merchant, he permitted evidence to be introduced to establish their validity as law. He also construed liberally the various archaic clauses that were written in commercial documents, despite the language used, thus developing a uniform system of commercial law.

Mansfield used a special jury of merchants for these cases, educating them himself so that they could act properly at the trial. He selected them with great care, seeking commercial experience and intelligence in each juror. After a while they became noted as "Lord Mansfield's jurymen."

Judge Vanderbilt, commenting on the role played by Mansfield in this respect, described it aptly: "The principles developed in this court covered the wide range of commercial law, maritime law, and the law of marine insurance. . . . It is not too much to say that it was he who put all of these subjects on a sound footing in English law. To a very large extent the principles of his opinions have been codified in the British Marine Insurance Act of 1906 and only to a slightly less degree have his rulings on negotiable instruments found their way into the English Bills of Exchange Act and the American Uniform Negotiable Instruments Act."

From chaos, Mansfield brought clarity and order to the rules of the Law Merchant. When he retired, the principles of the Law Merchant were as fixed and certain as the common law of which they became a part. For this reason he is known as "the father of modern commercial law."

Mansfield also left his impression on the common law in other ways. When he became Lord Chief Justice of the King's Bench, common law and equity were two different

systems of substantive law, administered separately under their own rules of pleading and procedure. The common law judges consisted of twelve jurists sitting on the King's Bench, Common Pleas and Exchequer. The Chancery judges were the Lord Chancellor and The Master of the Rolls. The legal profession itself was quite small. In 1783, there were no more than 350 lawyers at the Bar, of whom twelve were Serjeants and seventeen King's Counsel.

Mansfield was well aware of the superiority of equity rules at times over common law principles, especially for legal situations that required change. He attempted to enforce certain rules of equity in his common law court under circumstances where they would have been invoked in the Chancery Courts. He was successful in some cases and met rebuff in others. For example, he used the doctrine of equitable estoppel and extended the "common counts" to allow recovery for unjust enrichment, with good effect. He also allowed enforcement in law of the mortgagor's equity of redemption. Although many of his innovations in the field of equity jurisdiction were not accepted, it is interesting to observe that in England, and in many states in the United States, law and equity were finally merged in one court by legislation, thus vindicating Lord Mansfield's approach in the field of adjective law. Interestingly, too, the great law reformer, Bentham, objected to Mansfield's innovations and severely criticized him on the theory "that partial amendment is bought at the expense of universal certainty; that partial good thus purchased is universal evil; and that amendment from the Judgment seat is confusion."

Another rule he unsuccessfully attempted to establish was the doctrine of moral consideration enunciated in *Hawkes v. Saunders, 1 Cowp. 289, 98 Eng. Reprint 1091 (1782)*:

"Where a man is under a legal or moral consideration to pay, the law implies a promise, though none was ever actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no Court of Law

or Equity can enforce, and promises, the honesty and rectitude of the thing is a consideration."

Williston comments on this: "At the present day, there can be no doubt that the doctrine of moral consideration is wholly discredited in England. Though in England, as in the United States, certain exceptional cases . . . such as ratification of an infant's obligation and promises to pay debts barred by the Statutes of Limitation or bankruptcy still impose liability."

Mansfield also was influential in the development of the law of quasi contracts. In a famous case he allowed recovery of money wrongfully paid to the defendant, even though there was no contract. Until *Moses v. Macferlan, 2 Burr. 1005, 97 Eng. Reprint 676 (1760)* the law courts refused recovery in the absence of a promise or a debt. But there equitable principles formed the basis of Mansfield's opinion, in which he gave judgment for the plaintiff.

In his attempt to reform the law of real property by introduction of equitable principles, Mansfield suffered another setback. The use of Roman law principles by analogy could not be interwoven into the intricate pattern of real property law, evolving from its own long history and feudal background—especially so in alienation of property cases and descent of real property. However, the English *Real Property Act of 1925* incorporated some of Mansfield's views. In England and more so in the United States, it must be noted, his opinions in this field have been very much discounted. He was similarly rebuffed in his attempts to reform the criminal law of England.

Mansfield introduced some changes in the law of evidence, too; one of the more cogent is the rule that the verdict of a jury may not be attacked by an affidavit of one of the jurors. [See *Vaise v. Delaval, 1 Term Rep. 11, 99 Eng. Reprint 944 (1785)*].

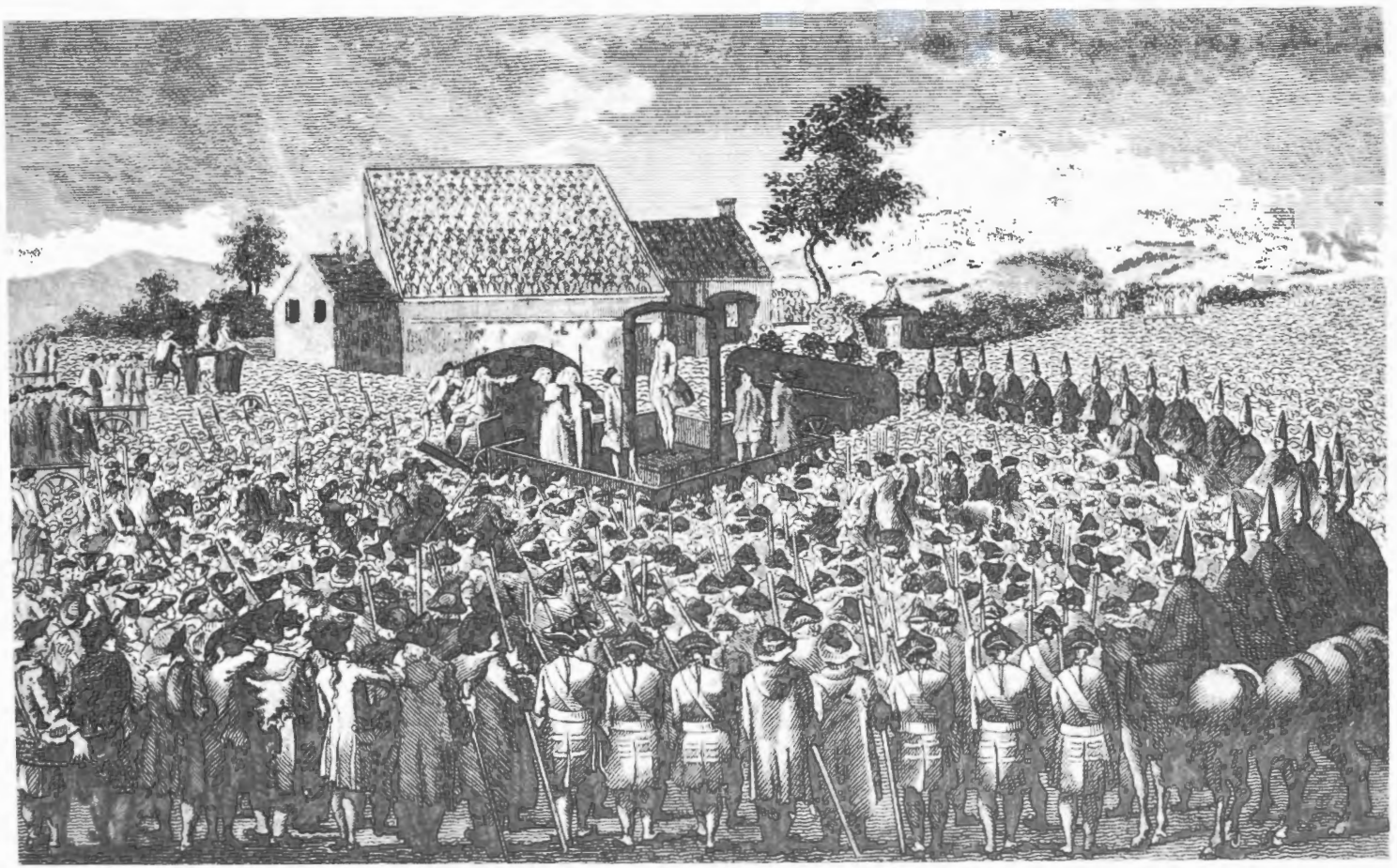
Mansfield, it will be remembered, was hated as a Tory by the American colonists. He was a firm supporter of the government that attempted to impose its will on the colonists. Yet, he was also a man of principle and when he found it necessary to uphold the concept of religious free-

dom in England, he did so, even though he realized it could result in great physical violence to his person. He favored a bill to repeal the provision in the English law which prohibited Catholics from purchasing or inheriting land, and which prevented priests from saying mass. Lord George Gordon aroused the Protestants to this "menace" and angry mobs burned Cathedrals and churches, surrounded the House of Lords and threatened harm to all who voted favorably on the bill. Mansfield, presiding as Speaker of the House, refused to be intimidated, although the mob of over 60,000 was clearly in control, and the government paralyzed. At 76 years of age, Mansfield calmly arranged for the passage of the bill. His magnificent home was burned to the ground and his valuable collection of books and art destroyed. Yet, when Lord Gordon was tried before him for treason in this outrage, Lord Mansfield's reputation for professional integrity and honest judgment was such that no one thought it necessary to request a change of venue including Lord Gordon himself. Mansfield conducted himself with utmost propriety, in no way influencing the trial, and Gordon was acquitted.

It is important to note, too, that Mansfield abolished slavery in England in *Sommersett's Case* by application of common law principles. Sommersett, a slave, was brought to England by his master, and sought release on a writ of habeas corpus. Ordering the slave's release, Mansfield stated:

"The air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of the English Law, whatever oppression he may heretofore have suffered and whatever may be the colour of his skin."

Lord Mansfield has been an inspiration to many students of the law. His career and personality can best be summed up in one of his own maxims: "Let justice be done though the heavens fall."



EXECUTION OF THE EARL FERRERS

The Case of the Mad Peer

The Right to have "A Fool for a Client"

There have been many remarkable trials in the annals of English criminal justice, but none to surpass the extraordinary and bizarre proceedings that took place before the House of Peers in Westminster Hall, in the 33d year of the reign of George II, on the 16th day of April 1760.

Lawrence Shirley, fourth Earl Ferrers, despite his descent from a long line of noble blood, was an "ill-looking" man, "dangerous" in appearance. His "figure" was "bad and villanous" and corresponded to his reputation of being a "horrid lunatic . . . a wild beast, a mad assassin and a low wretch."

For all his noble titles, the Earl was obviously a homicidal maniac. Although he had married a lovely lady, also of noble birth, he preferred to live with his mistress by whom he had four children. He had treated his wife criminally, carrying pistols to bed, and threatening to shoot her every night. He had beaten her continually. Finally, she obtained a separation from him by an Act of Parliament which also directed the appointment of receivers of his estate to guarantee her an adequate income.

The Earl's shocking behavior was the talk of polite society. Horace Walpole, author and wit, writing to Sir Horace Mann on March 21, 1758 noted:

"A frantic Earl of Ferrers has for this twelve months supplied conversation by attempting to murder his wife, a pretty, harmless young woman, and everybody that took her part. Having broken the peace to which the House of Lords tied him last year, the cause was trying again there on Friday last. Instead of attending to it, he went to the assizes at Hertford to appear against a highwayman, one Page, of extraordinary parts and escapes. The Earl had pulled out a pistol, but trembled so that the robber laughed, took it out of his hand quickly, and said, "My Lord, I know you always carry more pistols about you; give me the rest." At the trial, Page pleaded that my lord was excommunicated, consequently could not give evidence, and got acquitted."

One of the receivers of the Earl's estate named by Parliament, was his steward, John Johnson. The Earl, suspecting Johnson of being in conspiracy against him, decided to murder him. He arranged a meeting with Johnson in his country home and shot him with a pistol. The assault took place at three in the afternoon. Despite the seriousness of the wound, the Earl then persecuted Johnson until one the next morning, threatening again and again that he would finally murder him. He even attempted to remove the bandages, which a local doctor, called to the scene, had applied. Thus badgering the poor man, the Earl kept him in a state of tremor, at the same time drinking glass after glass of liquor. It was not until he became too intoxicated to prevent it, were the servants able to remove Johnson to his own home, where he died shortly thereafter. Hearing of his death, Ferrers then boasted how pleased he was to have accomplished it.

Once again, the Earl's mad behavior, became a common subject of conversation. Writing to George Montagu on January 14, 1760, Walpole described what he had been told about the murder.

"You have heard, I suppose, a horrid story of another kind, of Lord Ferrers murdering his steward in the most

barbarous and deliberate manner. He sent away all his servants but one, like that heroic murderess, Queen Christina, carried the poor man through a gallery of several rooms, locking them after him, and then bid the man kneel down, for he was determined to kill him. The poor creature flung himself at his feet, but in vain, was shot, and lived twelve hours. Mad as this action was from the consequences, there was no frenzy in his behavior; he got drunk, and, at intervals, talked of it cooly, but he did not attempt to escape, till the colliers beset his house, and were determined to take him, or alive or dead. He is now in the gaol at Leicester."

The grand jury of the county of Leicester returned a true bill that the Earl "did kill and murder" the steward, John Johnson, "feloniously, wilfully, and of his malice aforethought . . . against the peace of our said lord the King, his crown and dignity."

Being a peer of the realm, Lord Ferrers was required by law to be tried by his peers in parliament. Thus, it was that about 11:00 a.m., on April 16, 1762, the Lords paraded solemnly into the special court erected in Westminster Hall. Attired in ceremonial robes, they entered two by two in accordance with rank. Although many Peers were absent, at least 140 were present that day. After a pause, the Lord High Steward, Robert Lord Henley, Lord Keeper of the Great Seal of Great Britain entered alone, his train borne by pages. The Hall was crowded to capacity with on-lookers, including many foreigners, who appeared to be highly impressed with the solemnity and magnificence of the occasion.

With traditional pomp and dignity, the Lords were properly seated and the Lord High Steward escorted to the woolpack. As for the conduct of the Lord High Steward, however, it is interesting to note Walpole's criticism that "he neither had any dignity, nor affected any; nay, he held it all so cheap, that he said at his own table, t' other day, "I will not send for Garrick and learn to act a part." After the King's Commission was read, the Sergeant at Arms cried out:

"Oyez, oyez, oyez! Our sovereign lord the King strictly

charges and commands all manner of persons to keep silence, upon pain of imprisonment." Actually, this traditional admonition was unnecessary—everyone was so affected by the solemnity of the occasion that hardly a whisper could be heard in the Hall.

Then the Clerk of the Crown read the certiorari and the return thereof, together with the caption of the Indictment against, Laurence, Earl Ferrers.

In substance it stated that the noble prisoner stood arraigned before the House of Peers for the malicious and deliberate murder of his servant, a commoner, who had been steward of his estates.

Shortly thereafter, the Earl was brought in from the Tower of London, where he had been imprisoned, escorted by the Deputy Governor of the Tower carrying the axe before him, and as the prisoner approached the bar, the Deputy Governor stood with the axe in his left hand, the edge turned from him.

After advising the prisoner that he had been brought to the bar of the House of Peers to be tried upon a charge of the murder of John Johnson, the Lord High Steward cautioned him "to mark the nature of the judicature before which you now appear. It is a happiness resulting from your lordship's birth and the constitution of this country that your lordship is now to be tried by your peers in full parliament . . . if your lordship shall put yourself on trial, you must be assured to meet with nothing but justice, candor and impartiality . . ."

After being arraigned, the Clerk of the Crown turned to Lord Ferrers and proclaimed:

"How say you Laurence earl Ferrers, are you guilty of the felony and murder whereof you stand indicted, or not guilty?

"Not guilty, my lords", was the Earl's reply.

"Culprit", reponded the clerk, "How will your lordship be tried?"

"By God and my peers", was the response.

"God send your lordship a good deliverance", then said the clerk, "Serjeant at Arms, make proclamation."

At which point the Serjeant announced:

"Oyez, oyez, oyez! All manner of persons that will give evidence, on behalf of our sovereign lord the King against Lawrence earl Ferrers, the prisoner at the bar, let them come forth, and they shall be heard; for he now stands at the bar upon his deliverance.

Mr. Perrot, afterwards a baron of the Exchequer opened the case for the crown:

"May it please your lordships: This noble lord Lawrence earl Ferrers, the prisoner at the bar stands indicted for the felonious killing and murder of one John Johnson."

After describing the shooting of Johnson as set forth in the indictment and the manner in which it was done by the Earl and the expectation of the crown in this prosecution that if the facts were proven as charged in the indictment, the lords would find him guilty—the case for the crown was quickly and ably presented by the Attorney General, Charles Pratt, afterwards Lord Camden, Chief Justice of the Common Pleas and Lord Chancellor.

He immediately set the tone of the proceedings when he stressed:

"The noble prisoner stands here arraigned before your lordships for that odious offence, malicious and deliberate murder. There cannot be a crime in human society that deserves more to be punished, or more strictly to be enquired after; and therefore, it is that his majesty, the great executive hand of justice in this Kingdom, has promoted this inquiry, whereby all men may see, that in the case of murder his majesty makes no difference between the greatest and meanest of his subjects."

"The prisoner has a right, from his quality, to the privilege of being tried before this noble tribunal; if he is innocent, he has the greatest reason to be comforted, that your lordships are his judges; for that nobleness and humanity, which prompt you naturally to incline towards mercy, will strongly exert themselves in the protection of innocence. But, on the other hand, if the prisoner is really guilty of the charge, his case is truly deplorable; because your minds cannot be deceived by the false colouring of

rhetoric, nor your zeal for justice perverted by any unmanly compassion."

After presenting all the evidence the crown expected its witnesses to give concerning the manner in which the murder took place, the Solicitor General called the first witness, Elizabeth Burgeland, a maid-servant in Lord Ferrer's house. She testified under oath: That she had let Johnson into the Earl's house, that the Earl was expecting him, locked the doors, later heard the pistol shot, and had been told by Johnson, that he would like to see his children as he was dying. A number of other witnesses were called, all testifying to the horrible nature of the crime. As the evidence unfolded, the reaction of the Lords was one of deep shock and abhorrence. Many turned their heads from the Earl in apparent disgust.

After the Attorney General rested the case for the crown, the Lord High Steward turned to the prisoner and said:

"My lord Ferrers, the counsel for the crown have done; now is the time for your lordship to make your defence; and if you have any witnesses to examine, now is your time to call them."

Earl Ferrers replied: "My lords, there have been a great variety of circumstances that have appeared through the course of this evidence. I really do not recollect anything that happened since the time relative to the affair; and I should hope your lordships would give me a farther day to make my defence."

The Lord High Steward objected: "Your lordship hath had a great deal of time, and you have had counsel assigned you, and orders for summoning your witness. It is now time to proceed to your defence."

Lord Ferrers pleaded: "I hope your lordships will be so good as to give me till tomorrow, as there are some circumstances that I could wish to consult my counsel about."

At this point, Lord Mansfield, who had been actively involved in the questioning of witnesses for the crown, intervened:

"My lords, as your lordships cannot debate here upon the application that has been made by the noble lord at the bar, to adjourn the trial till tomorrow, I could wish he would open to your lordships the nature of his defence, or some reason why he is not prepared to go on now, otherwise, when your lordships adjourn, you will have nothing to debate upon, but barely whether there shall be this delay because it is asked; and it may be a dangerous precedent to establish that a trial shall be adjourned, as of course, if desired, just when the evidence in support of the prosecution is closed. If he should give your lordships a reason for it, then it will be in your lordship's discretion, whether that reason is sufficient to induce your lordships to adjourn till tomorrow. I think he should open the nature of his defence, and state some ground for the delay he asks."

Lord Ferrers responded. "My lords, by the kind of defence recommended to me, it will be impossible to go on at present; there are several witnesses to be examined, and really, my lords, I am quite unprepared."

After being warned once again to proceed with his defence, Lord Ferrers then startled the House by claiming: "My lords, I can hardly express myself, the very circumstance shocks me so much; but I am informed, from several circumstances, of an indisposition of mind . . . I really don't know how myself to enter upon (such a defence) . . . it is what my family have considered for me, and they have engaged all the evidence that are to be examined upon this unhappy occasion, who I really have not seen; . . . My lords, I believe that what I have already mentioned to your lordships, as the ground of this defence, has been a family complaint; and I have heard that my own family have, of late, endeavored to prove me such. The defence I mean is occasional insanity of mind; and I am convinced, from recollecting within myself, that, at the time of this action, I could not know what I was about! I say, my lords, upon reflecting within myself, I am convinced, that, at that time, I could not know what I was about . . ."

It should be noted at this point that there was a basic reason for the paradox in which the Earl found himself. At common law, it was a settled rule, that counsel would not be allowed a prisoner during his trial, upon the general issue in any capital crime, unless a point of law arose which properly required debate. Even Blackstone, who extolled the British system of justice so lavishly, was critical of this rule. He noted in his *Commentaries* that "however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge should be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular, [still it seems to be a rule] not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?"

At the time Blackstone wrote his *Commentaries* (1765-1769), it was assumed that the benefit of counsel to plead for them in capital cases was first denied to prisoners by a law of Henry I. Blackstone, however, believed, it was based upon an improper construction of that statute.

Blackstone continued ". . . and the judges themselves are so sensible to this defect that they never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact; for as to matters of law arising on the trial, they are *entitled* to the assistance of counsel."

Although the rule denying prisoners in capital cases counsel on matters of fact was gradually being relaxed at the time of Lord Ferrer's trial, still, he was obliged to set forth his own defense, cross-examine adverse witnesses and elicit desired information from his own witnesses. His assigned counsel was only permitted to advise him on questions of law.

Thus, there was indeed reason for the Earl's quandry as how to proceed with his defence! He certainly merited the adjournment, but it was denied, and he diffidently

called his first witness. As his testimony began to enfold, it soon became apparent, that the Earl was engaged in the desperate attempt to prove his own insanity. The Peers sat back in disbelief, and Walpole, who was very much intrigued by this highly irregular proceeding, wrote to George Montagu: ". . . it was a strange contradiction to see a man trying, by his own sense, to prove himself out of his senses . . ."

The first witness was John Bennefold, who was examined by Earl Ferrers as follows:

Q. How long have you known me? A. Above these twenty years.
Q. Were you ever employed by me in any shape? A. Yes.
Q. In what shape? A. In receiving his lordship's rents, when they were sent him out of the country.
Q. Did you know any of the family besides me? A. Yes.
Q. Do you remember my uncle, or any other of the family? A. Yes, the late lord Ferrers, Henry.
Q. What disorder had he? A. Lunacy.
Q. How many years before he died? A. Several years before he died, at Kensington, Gore.
Q. Did you know lady Barbara Shirley. A. No.
Q. Did you ever hear that she was disordered? A. Yes, I have.
Q. Please to observe what you know of my conduct, as to the state of my mind, without having any particular questions asked you? A. His lordship has always behaved in a very strange manner, very flighty, very much like a man out of his mind, more particularly so within these two years past, such as being in liquor, and swearing and cursing, and the like, and talking to himself, very much like a man disordered in his senses; and then he has behaved himself, as well as any other gentleman at times.
Q. Do you know of any particular time, or of any par-

ticular action? A. Nothing in particular, more than the particular circumstances of my lady, and expressing great hardships, and dissatisfaction with the act of Parliament.

Q. Have you observed irrational behavior when I have not been in liquor? A. Yes, I have.

Q. Was it frequent or seldom? A. It was often.

Q. Can you recollect any particular irrational behavior in me when I have not been in liquor? A. I cannot say that I can recollect any particular passage.

Q. Did you ever see me walking about the room, talking to myself; making motions with my head, and talking to myself? A. Yes, a great many times.

Q. Did you think that I was disturbed in my mind? A. Yes.

Pratt, the Attorney General, quickly demolished the witness's testimony on cross-examination.

Q. In conversation at any time, have you observed my lord to give you irrational or insensible answers? A. I cannot say he has given me any insensible answers.

Q. I should be glad to know whether you have any reason to believe, from his behavior, that he did not understand enough to distinguish right from wrong? A. That is a question I am in some doubt of answering.

Q. I have asked as to your opinion; if you will recollect what discourse has passed between you, you will be able to give an answer; now from your discourse and conversation, do you think or believe he was in that state of mind as not to know right from wrong at any time? A. That is a question I cannot answer to.

Q. You will be pleased to recollect, that you told me, when I asked you, that my lord never gave you an irrational answer; why cannot you give your opin-

ion as to his sanity? A. My lord's behavior appeared in general in such manner as I have mentioned.

Then turning to the peers who were listening with fascinated attention, Pratt observed: "My lords, this witness did not mention any particular act, only talking to himself, and motions with his head; I am questioning him upon those kinds of acts that proceed from words or speeches."

Then returning to the witness he asked: "Did you ever, from his words or speeches, conceive that he was not himself?"—The witness replied: "No further than by being displeased, often talking to himself, like a man that was out of his mind."

Continuing the cross-examination Pratt asked:

Q. Did my lord manage his affairs by himself? A. He managed them himself; he gave me directions.
Q. Were those directions reasonable and sensible? A. Sometimes they were, though thought unreasonable and insensible by the persons he wrote to.
Q. Can you recollect any instances, and the persons that thought them so? A. I cannot recollect any circumstances relating to family matters; his mother, when I have carried such messages, has thought him to be in a wrong mind, in writing to her in the manner he did.
Q. Did Mrs. Shirley ever treat him as an insane person, or talk of sending for a physician to him? A. Not that I know of.
Q. Did any other person think my lord so insane as to want that? A. I cannot recollect any person in particular.
Q. Was it easy to impose upon his lordship in his affairs, or difficult? A. It was not easy to impose upon his lordship that I know of.
Q. As you have known him so long, and have been

admitted to his familiarity, I wish you would recollect one single irrational expression that you have ever heard him make use of. A. I cannot recollect any in particular.

Q. You say that he seemed displeased with his lady, and with the act of parliament; please to recollect, whether, upon that occasion, his behavior was such as betrayed his insanity, or anything that was irrational? A. My lord expressed a good deal of dissatisfaction at the act of Parliament.

Q. What was the dissatisfaction? and was it general as well as particular? A. In relation to the estate's being taken away, and receivers being put upon it.

Q. Do you apprehend that that sort of expression denoted insanity or sanity? A. That I cannot take upon me to determine.

Q. You said that he expressed a dissatisfaction, because his estate was taken away from him, and receiver put upon it. I desire to know whether those expressions bespeak a man in his senses or out of his senses? A. I cannot say.

Q. Are those expressions the expressions of a fool or of a man of understanding upon the subject? A. I should think, of a man of understanding.

Q. You have not been able to answer as to any particular speeches that denoted him to be insane; now do you remember any act of his, of any kind that denoted a disordered mind? A. I cannot say I can . . .

Q. Then I desire to know, whether lord Ferrers, from the conversation you had with him, appeared to be rather of better parts than an ordinary kind of man? A. Yes, to be sure.

Lord Ferrers, called other witnesses, including his own brothers, to testify to the same effect, mainly that he and his family had always suffered from lunacy. He maintained his composure throughout and spoke in a dignified and calm manner. Walpole noted that "At first I thought

Lord Ferrers shocked, but in general he behaved rationally and cooly . . ."

When the brothers were called to testify, Walpole wrote to Montagu "It was more shocking to see his two brothers brought to prove the lunacy in their blood, in order to save their brother's life. Both are almost as ill-looking men as the Earl; one of them is a clergyman, suspended by the Bishop of London for being a Methodist, the other a wild vagabond, whom they call in the country, *ragged and dangerous*."

The Attorney General and a number of Peers who also interrogated the witnesses clearly established through their questioning that despite the Earl's idiosyncrasies, he was never really irrational and that he was always capable of distinguishing properly between moral good and evil.

Some of the Peers acted so peculiarly in their questioning that Walpole observed:

"But never was a criminal more literally tried by his *peers*, for the three persons who interested themselves most in the examination were at least as mad as he; Lord Ravensworth, Lord Talbot and Lord Fortescue. Indeed, the first was almost frantic."

At one time after the Earl had asked a witness about the "distemper that I am afflicted with" and the witness responded in such detail as to his brutality and ill-manners as to give him cause to regret the question, he had to appeal to the Lords to "stop this witness; I only meant to ask him a general question." Lord Ravensworth, however, intervened: "My lords", he said, "in justice to myself and to your lordships, I hope that the witness may go on, though the prisoner desires he may be stopped." Lord Mansfield, however, promptly put him in his place, observing: "If any of your lordships have any questions to ask the witness, you will do it: the prisoner will ask such as he thinks proper."

Then Doctor John Monro, an eminent physician, who specialized in illness of the mind, was called by Lord Ferrers. He testified that he attended the Earl's father when

"he was under the unhappy influence of lunacy". The symptoms of lunacy were "uncommon fury, not caused by liquor, but very frequently raised by it . . . I do not know a stronger, a more constant, or a more unerring symptom of lunacy than jealousy, or suspicion without cause or grounds: There are many others too long to enumerate . . ."

When asked by the Earl "whether any and which of the circumstances which have been proved by the witnesses are symptoms of lunacy", the Attorney General objected. The Lord High Steward then asked the prisoner: "Do you desire your counsel to be heard upon that". This was the accepted practice on the role of the counsel assigned to the prisoner—to argue points of law, on behalf of his client. The Earl agreeing, the Earl of Hardwicke, his counsel, suggested a compromise.

"My lords", he stated, "this question is too general, tending to ask the doctor's opinion upon the result of the evidence, and is very rightly objected to by the counsel for the crown; if the noble lord at the bar will divide the questions and ask whether this or that particular fact is a symptom of lunacy, I dare say they will not object to it."

Lord Hardwicke's recommendation was accepted by the Attorney General and the Earl, who then proceeded to ask the doctor, "whether quarreling with friends without cause is a symptom of lunacy", to which he replied: "Yes, it is without cause a constant one." His response was to the same effect on the symptoms of "going generally armed where there is no apparent danger", and "spitting in the looking glass, clenching the fist, and making mouths," "walking in the room, talking to himself, and making odd gestures", and "quarreling without cause". Then he was asked by the Earl whether it is "common to have such a disorder (lunacy) in families in the blood," to which Dr. Monro replied "Unfortunately too common". He also noted that lunatics had periods of awareness of their own lunacy and were apt to be seized with fits of sudden rage, without apparent cause.

At the end of his defence, Lord Ferrers then asked for

special permission to have his summation, which he had reduced to writing, read by the clerk.

The Lord High Steward asked him whether it was his own writing. The Earl replied that "the attorney got it copied".

As the clerk read it to the attentive House, it was obvious he was raising a point which dramatically indicted the administration of criminal justice in England at the time.

"My lords," he stated, "It is my misfortune to be accused of a crime of the most horrid nature. My defence is, in general, that I am not guilty; the fact of Homicide is proved against me by witnesses, who, for aught I can say to the contrary, speak truly.

"But if I know myself at this time, I can truly affirm, I was incapable of it, knowingly: if I have done and said what has been alleged, I must have been deprived of my senses.

"I have been driven to the miserable necessity of proving my own want of understanding, and am told, the law will not allow me the assistance of counsel in this case, in which, of all others, I should think it most wanted.

"Witnesses have been called to prove my insanity—to prove an unhappy disorder of mind, and which I am grieved to be under the necessity of exposing. If they have not directly proved me so insane as not to know the difference between a moral and an immoral action, they have at least proved that I was liable to be driven and hurried into that unhappy condition upon very slight occasions.

"Your lordships will consider whether my passion, rage, madness (or whatever it may be called) was the effect of a weak or distempered mind, or whether it arose from my own wickedness, or inattention to my duty.

"If I could have controlled my rage, I am answerable for the consequences of it. But, if I could not, and if it was the mere effect of a distempered brain, I am not answerable for the consequences.

". . . My life is in your hands, and I have every thing

to hope, as my conscience does not condemn me of the crime I stand accused of; for I had no preconceived malice; and was hurried into the perpetration of this fatal deed by the fury of a disordered imagination . . ."

The Solictor General then summed up for the crown. First he addressed himself to the law of the case, citing as authority Hale's *Pleas of the Crown* to the effect: "If there be a total permanent want of reason, it will acquit the prisoner. If there be a total temporary want of it, when the offense was committed, it will acquit the prisoner; but if there be only a partial degree of insanity, indexed with a partial degree of reason, not a full and complete use of reason, but (as Lord Hale carefully and emphatically expresses himself) a competent use of it, sufficient to have restrained those passions, which produced the crime, if there be thought and design; a faculty to distinguish the nature of actions; to disarm the difference between moral good and evil; then upon the fact of the offense proved, the judgment of the law must take place."

Then—after analyzing the evidence to establish that the Earl had weighed the motives, he concluded "that the malice conceived on this unfortunate occasion, was steady, cool and premeditated . . ." As to the testimony of Dr. Monro, the symptoms he had described of lunacy, common fury, jealousy and suspicion did not infer insanity, nor was the carrying of arms.

When the Solictor General sat down, Lord Ferrers was removed to the Tower.

The Lord High Steward, then stood up, uncovered; and beginning with the youngest peer, said:

"George, Lord Lyttelton, what say your lordship? Is Lawrence, Earl Ferrers Guilty of the felony and murder whereof he stands indicted, or not guilty?"

Whereupon that gentleman standing up in his place, uncovered and laying his right hand upon his breast, answered:

"Guilty, upon my honor".

Thus, did every peer answer unanimously!

The prisoner was then brought back from the Tower,

to the bar of the House in Westminster Hall and advised by the Lord High Steward that he had been found guilty of the felony and murder for which he had been indicted and that judgment would be rendered the next day, Friday, April 18.

On that day, the prisoner was brought to the bar once again and asked by the Lord High Steward "what has your lordship to say, why judgment of death should not pass upon you according to law?"

Lord Ferrers acknowledged that he had been given a "fair and candid trial" and thanked the lords for their graciousness.

He apologized: "I am extremely sorry that I have troubled your lordships with a defence that I was always much averse to, and has given me the greatest uneasiness; but it was prevailed on by my family to attempt it, as it was what they themselves were persuaded of the truth of; and had proposed to prove me under the unhappy circumstances that have been ineffectually represented to your lordships."

Then after beseeching the peers to recommend clemency for him, to the king, he asked for a delay in his execution date to allow him the opportunity "of preparing myself for the great event, and that my friends may be permitted to have access to me."

In response, the Lord High Steward reassured the Earl that he should not be ashamed of his defence, for "he received no benefit from it . . . since it hath appeared to us all, from your cross-examination of the King's witnesses, that you recollected the minutest circumstances of facts and conversations, to which you and the witnesses only could be privy, with the exactness of a memory more than ordinarily sound; it is therefore as unnecessary as it would be painful to me, to dwell longer on a subject so black and dreadful."

Then finally he concluded:

"Nothing remains for me, but to pronounce the dreadful sentence of the law; and judgment of the law is, and this high court doth award,

"That you, Lawrence earl Ferrers, return to the prison of the Tower, from whence you came; from thence you must be led to the place of execution, on Monday next, being the 21st day of this instant April; and when you come there, you must be hanged by the neck till you are dead, and your body must be dissected and anatomized.And God almighty be merciful to your soul!"

As the last part of the awesome sentence was read, Lord Ferrers' composure suffered for a moment. He changed color, his jaw quivered, and he appeared to be disturbed. But he recovered quickly thereafter to the point where he seemed to be unconcerned.

The Earl was then returned to the Tower and the trial was over; the last murder trial thus held in the House of Lords. Before the House adjourned, however, the Peers agreed to postpone the day of execution to the 5th day of May following.

The prisoner appealed to George II, praying that at least the punishment be changed from hanging to beheading, as hanging was unbefitting a peer of the realm. The House of Ferrers, he reminded the King, descended from the royal blood of the Plantagenets and had been distinguished for generations. Sir Henry Shirley, the second baronet of the family, had married one of the daughters of the famous Earl of Essex who was beheaded in the tower in the reign of Queen Elizabeth. At least he was entitled to suffer the same fate as his ancestor rather than die at the place appointed for the execution of common felons.

George II refused the request, because the crime was so "atrocious", adding: "No, he has done the deed of the bad man, and he shall die the death of the bad man."

While awaiting the day of execution, the Earl left sixty pounds a year to his mistress, a thousand pounds to each of his natural daughters, and thirteen hundred pounds to the children of the murdered steward, Johnson. A contemporary account, written in 1778 noted: "This legacy, we are assured, is still unpaid."

On the day set for the execution, May 5, the Sheriffs

claimed his body from the Lieutenant of the Tower by authority of a writ under the great seal of England. For the occasion, Lord Ferrers arranged to be dressed in a white suit, embroidered with silver. "This is the suit in which I was married," he explained, "and in which I will die."

Horace Walpole witnessed the event and he described it vividly in a letter to Sir Horace Mann, who was then residing in Italy.

"What will your Italians say to a peer of England, an earl of one of the best families, tried for murdering his servant, with the utmost dignity and solemnity, and then hanged at the common place of execution for highwaymen [Tyburn Hill] and afterwards anatomized? . . . [A statute made in the 25th year of George II for preventing the crime of murder enacted "that the body of every person convicted of murder . . . within the city of London . . . be immediately conveyed . . . to the hall of the Surgeons' Company . . . and . . . shall be dissected and anatomized by the said surgeons . . . (before burial)]"

"He set out from the Tower at nine, amidst crowds, thousands. First went a string of constables; then one of the sheriffs, in his chariot and six, the horses dressed with ribbons; next Lord Ferrers in his own landau and six, his coachman crying all the way; guards at each side; the other sheriff's chariot followed empty, with a mourning coach-and-six, a hearse, and the Horse Guards . . .

"When the rope was put around his neck, he turned pale, but recovered his countenance instantly, and was but seven minutes from leaving the coach, to the signal given for striking the stage. As the machine was new, they were not ready at it; his toes touched it, and he suffered a little, having had time, by this bungling, to raise his cap; but the executioner pulled it down again, and they pulled his legs, so that he was soon out of pain, and quite dead in four minutes.

"He desired not to be stripped and exposed, and Vaillant [the Sheriff] promised him, though his clothes must be taken off, that his shirt should not. This decency ended with him. The sheriffs fell to eating and drinking on the

scaffold, and helped up one of their friends to drink with them, as he was still hanging, which he did far above an hour, and then was conveyed back with the said pomp to Surgeons' Hall to be dissected.

"The executioners fought for the rope, and the one who lost it cried. The mob tore off the black cloth as relics; but the universal crowd behaved with great decency and admiration, as they well might, for sure no exit was ever made with more sensible resolution and with less ostentation.

"If I have tried you by this long narrative, you feel differently from me. The man, the manners of the country, the justice of so great and curious a nation, all to me seem striking . . ."

"Another contemporary account of the Earl's last moments includes the beginning of some lines of verse he wrote on the morning of the execution, when he was interrupted by the warden calling for him:

In doubt I live, in doubt I die;
Yet, undismay'd, the vast abyss I'll try,
And plunge into eternity.
Through rugged paths—.

Lord Ferrer's trial and manner of execution made a tremendous impression in England and on the continent—for here was a true example of English justice! The wages of sin paid to a peer of the realm were as grim as those paid to the most ragged tatterdemalion.

Yet, even more significantly, the case reflects one of the most glaring defects in the English system of justice at the time—the rule which deprived prisoners of the assistance of counsel in trials involving capital offenses and commission of felonies, yet permitting such representation in petty trespasses, and minor misdemeanors. Lord Ferrers not only had to cross-examine the witnesses for the crown, depending on his own wit and ingenuity, but even more difficult to examine for himself witnesses he called to establish his defence of insanity. It was not until 1836

that an act of Parliament (6 & 7 Will. 4, c. 114) allowed a prisoner charged with felony, to call upon counsel to examine and cross-examine witnesses and address the jury. Even more incredibly, it was not until 1898 in England, that a prisoner was allowed to testify in his own behalf, a practice incidentally, which has been reflected in the American system of justice, even in our day.

The reason given for these practices was expressed by Lord High Steward Finch in Lord Conwallis' trial in 1678.

"The fouler the crime is, the clearer and the plainer ought the proof of it be. There is no other good reason can be given why the law refuseth to allow the prisoner at the bar counsel in matter of fact when his life is concerned, but only this, because the evidence by which he is condemned ought to be so very evident and so plain that all the counsel in the world should not be able to answer upon it."

Much of this legal reform can be attributed to Jeremy Bentham's crusade against the inequities of the law. In 1843, Lord Denman's Act abolished the incompetency of interested witnesses in civil litigation; and subsequent legislation similarly, for civil parties in 1851, and their spouses, in 1853.

These English acts influenced the reform movement in Michigan and New York which followed suit around the middle of the 19th century and then by other states. However, these reforms were limited to civil cases. Concern was expressed that to extend them to criminal procedure would give rise to and encourage perjurious statements by prisoners allowed to testify on their own behalf. Chief Justice John Appleton of Maine, became the prime mover for reform in this area. As a result of his influence, Maine, in 1864, enacted the first American state statute allowing a prisoner to testify, if he so desired. Massachusetts in 1866, Connecticut in 1867, New York and New Hampshire in 1869 and New Jersey in 1871, enacted similar statutes. By 1900, all the other states, except Georgia, allowed such prisoners to testify on their own behalf. As late as 1961, the Georgia Statute made a pris-

oner charged with a criminal offense, incompetent to testify in his own behalf, under oath. This practice was reviewed in *Ferguson v. Georgia*, by the Supreme Court of the U. S. (365 U.S. 570). The Georgia statute did allow the prisoner, however, to make an unsworn statement to the jury without subjecting himself to cross-examination. At the trial in the George Court, the prisoner's counsel was denied the right to ask him any questions when he took the stand to make his unsworn statement. The Supreme Court held that this practice denied the prisoner the effective assistance of his counsel at a critical point in his trial and thus violated the Due Process Clause of the 14th Amendment. As a result, the Georgia statute was amended in 1973 to allow a prisoner who wishes to testify, and announces in open court his intention to do so, to so testify. If he elects to do so, he can now be sworn in as any other witness and may be examined and cross-examined as any other witness. His failure to testify, however, may not be commented upon in court.

The Sixth Amendment to the U. S. Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." When this amendment was added to the Constitution as part of the first ten amendments, hardly a protest was heard and the debate thereon was so limited and uncontroversial, that problems eventually arose as to its actual meaning. One of the reasons, at the time, for the general acceptance of the concept of the right to counsel in a criminal trial, was that it was considered universally throughout the colonies as an established and legally authorized practice, indispensable to a fair trial, contrary to the rule in England. The failure in Congress to debate its meaning in more than superficial manner raised questions later as to its scope and import. For example, it was well and good that a prisoner had the right to counsel in his trial, but suppose he could not afford to retain counsel? Suppose he was too ignorant to understand the need for counsel in his case? Who, then pays for such counsel and who then protects such persons? Thus, the very

simplicity of the statement, and the lack of debate thereon allowed for ambiguity in its interpretation later. It should also be noted in this context, that originally the Sixth Amendment applied only to the federal government and its courts and not to the States. Later, by being absorbed under the 14th Amendment, the courts applied the Sixth Amendment to the States as well.

The first opportunity the Supreme Court had to decide whether right to counsel was a requirement of a "fair trial" was in the infamous Scottsboro case, in which nine black boys were tried in Alabama for rape of two white women—found guilty and sentenced to death—all in one day—and without the advice or help of counsel. The Supreme Court in 1932, speaking through one of its most conservative members, Justice Sutherland, expressed its indignation as follows in *Powell v. Alabama,* 287 U.S. 45:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect."

Sutherland then held that when the defendant in a capital case is unable to employ counsel and is not so constituted mentally to make an adequate defense, then "it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process at law." The assignment of counsel also had to be made in time to allow for "effective aid in the preparation and trial of the case . . ."

It was not until the landmark case of *Gideon v. Wainwright*, 372 U. S. 335 (1963) that the Supreme Court ruled that the due process clause of the 14th amendment included the right to counsel. "In our adversary system of criminal justice", Justice Black declared, "any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." It was indeed poetic justice that Justice Black wrote the opinion of the court in *Gideon v. Wainright*, for he had vehemently dissented when the Supreme Court decided in *Betts v. Brady*, 316 U.S. 455 (1942) that the right of an accused person to assistance of counsel "is not a fundamental right essential to a fair trial" under the due process clause of the Fifth Amendment, even though required in federal cases. Only when the circumstances are "shocking to the universal sense of justice" would the 14th Amendment be violated. It must have given Justice Black great satisfaction to hold for the court in *Gideon* "upon full reconsideration we conclude that *Betts v. Brady* should be overruled."

The Supreme Court has gone even further in ensuring that a person who is tried today on a criminal charge in either a federal or state court is given adequate legal counsel for in *Escobedo v. Illinois*, 378 U.S. 478 (1964) and in the *Miranda* case, 384 U.S. 436 (1966), it decreed that such right to counsel must also be made available to the accused at the preliminary stages preceding the trial itself.

A new dimension was added to the Sixth Amendment guarantee that an accused in a criminal prosecution must be afforded the right to the assistance of counsel for his defense by *Faretta v. California*, decided by the Supreme Court of the United States in 1974 (422 U.S. 806). There it held that such a defendant in a criminal trial has an independent constitutional right to appear *pro se* and defend himself without counsel when he voluntarily and intelligently elects to do so. Faretta was charged with grand theft in an information filed in the Superior Court of Los Angeles County, and at the arraignment, he refused to be

represented by the public defender, but instead, insisted on representing himself. The trial judge ruled that Faretta had no constitutional right to conduct his own defense and only allowed the court appointed lawyer to represent him at the trial. Faretta was found guilty by the jury and the Supreme Court granted certiorari. By depriving Faretta the opportunity to conduct his own defense, Mr. Justice Stewart held in the opinion of the Court, the trial judge thus committed reversible error. The judgment below was vacated and the case was remanded "for further proceedings not inconsistent with this opinion."

"If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client', the Court by its opinion . . . now bestows a *constitutional* right on one to make a fool of himself", declared Mr. Justice Blackmun, in his dissenting opinion in the *Faretta* case, in which the Chief Justice and Mr. Justice Rehnquist joined. (*Id.* at 852.)

After disagreeing with the court opinion on the textual support for its conclusion in the language of the Sixth Amendment, and the historical evidence relied upon, Mr. Justice Blackmun stressed that "the procedural problems spawned by an absolute right to self-representation will far outweigh whatever tactical advantage the defendant may feel he has gained by electing to represent himself." For example, "Must every defendant be advised of his right to proceed *pro se*? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed *pro se*, does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*? Must he be allowed to switch in mid trial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the *pro se* defendant differently than it would professional counsel?" Many of these questions, Mr. Justice Blackmun suggested "will haunt

the trial of every defendant who elects to exercise his right to self-representation."

Thus, in protecting the rights of an accused, our system of criminal justice has been turned completely around from the barbarous practices of English common law. As Justice Black reiterated in *Gideon*: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitution and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

A Student's Guide to Mr. Justice Holmes

"A Life of Rare Distinction"

The literature on Oliver Wendell Holmes, Jr., is so extensive that to be original in interpreting the man or even commenting on his place in the American legal system becomes an exercise in judgment and discretion. To suggest the problem, merely attempting to conjure up a concise title characteristic of his personality, philosophy or stature, hitherto unpublished, strains the imagination. For example, a title usually used to review and appraise a great legal figure, and which would be quite appropriate for a student audience, could be "Mr. Justice Holmes Revisited". Unfortunately, this has already been preempted. Then there are these possibilities: "Oliver Wendell Holmes: The Great American Judge"; "The Democracy of Mr. Justice O. W. Holmes"; "Holmes: The Historian"; "Oliver Wendell Holmes, The Jurist"; "Legal Philosophy of Justices Holmes and Brandeis"; "Justice Holmes—A Judge with Imagination"; "Justice Holmes, Liberal"; "Yankee from Olympus"; "The Mind and Faith of Justice Holmes"; and, "The Legacy of Holmes and Brandeis." All these, however, are already a matter of record.

The life story of Holmes as a great American, has

been investigated and popularized in biographies and even depicted on the stage in *The Magnificent Yankee.*

As a result, I shall be governed by Andre Gide's well-known epigram: "Everything has been said already, but as no one listens, we must always begin again." Holmes was a prodigious letter writer. The thought occurred to me that I might analyze some of his letters with the purpose of commenting on how they reflect his personality and his thinking as a judge and a philosopher, and then interweave this analysis with his philosophy as discussed in court decisions and in his writings. I shall also take into account the three versions of "John" described by Holmes's famous father in the *Autocrat at the Breakfast Table:* (1) what John was really made like by God; (2) what John thinks of himself ideally, and (3) what Thomas thinks of John. Since I am writing for law students, I shall keep returning to the spirit in which Holmes pursued the law. "Law is a business to which my life is devoted," he once stated, "and I should show less than devotion if I did not do what in me lies to improve it, and when I perceive what seems to me to be the ideal of its future, if I hesitated to point it out and press toward it with all my heart."

Several years after Holmes's death in 1935, Francis Biddle, a great lawyer himself, suggested in a brief biography of the Justice, that his place in American history was secure. Thirty years later he concluded that he was more than convinced that Holmes would rank among those Americans who are accepted as national heroes—Washington, Jefferson, Lincoln, Grant, Whitman, and Mark Twain. He then continued that this was curious to him, because Holmes's qualities were not those that would "capture the allegiance of the crowd." It is even more curious to me, because Holmes has, in a sense, become a controversial character and in the last thirty years has been subject to revisionist critiques in the legal literature.

His philosophy has actually been attacked as totalitarian, skeptical and unconcerned with the influence or morality on law. Holmes himself, I can assure you, could not have cared less what either side thought of him.

When Holmes was being considered by President Theodore Roosevelt for appointment to the Supreme Court, he was both extravagantly praised and bitterly criticized in the press and elsewhere, depending on how the writer felt about Holmes's philosophy and record on the bench. Holmes deplored both approaches, viewing them as extremely distasteful and insulting. He wanted to be recognized not as a partisan, but as a judge, independent and philosophically sound.

Writing to his old friend, Sir Frederick Pollock, he complained:

> It makes one sick when he has broken his heart in trying to make every word living and real to see a lot of duffers, generally I think not even lawyers, talking with the sanctity of print in a way that at once discloses to the knowing eye that literally they don't know anything about it. . . . The legal periodicals are generally in vacation. I hope some of them may have an intelligent word, but you can understand how at a moment of ostensible triumph I have been for the most part in a desert—when I hoped to see that they understand what I meant. . . .

Years later, he continued in this vein in another letter to Pollock that his main purpose in life had been "to make a few competents like you say that I had hit the *ut de poitrine* in my line. . . ."

Holmes's name, I believe, will survive as that of a great American for other reasons—his personality, style, wit and *joie de vivre*. His friend, Arthur Dehon Hill, stated it well in describing Holmes as "a great human figure." Hill noted that "Holmes's greatest service as a lawyer was that he showed to all men that the law need not be a dreary competition of sordid interests and that a 'man may live greatly in the law as well as elsewhere.'" Holmes said it even more succinctly when he told Harvard law students: "And what a profession it [Law] is! No doubt everything is interesting when it is understood and seen in its connection with the rest of things. Every calling is great when greatly pursued. But what other [calling] gives such scope to realize the spontaneous energy of one's soul?

In what other does one plunge so deep in the stream of life—to share its passions, its battles, its despairs, its triumphs, both of witness and actor?"

Despite the great age he reached, Holmes was eternally youthful. He had a real community of interest with the young because of his consummate sense of the joy of life. Moreover, Holmes understood the beauty of life. On one occasion he told Dean Acheson: "If that ceiling should open, and through the opening should come the voice of God saying, 'Wendell, you have five minutes to live,' I should reply, 'Very well, Boss, but I wish it were ten.' "

To Holmes, life was action; to live is to function. In a speech to the Bar Association of Boston on his 59th year (he was then Chief Justice of the Massachusetts Supreme Court), Holmes developed this theme:

> We cannot live our dreams. . . . [T]he joy of life is to put out one's power in some natural and useful or harmless way. . . . The rule of joy and the law of duty seem to me all one. . . . [T]he end of life is life. Life is action, the use of one's powers. . . . Life is an end in itself, and the only question as to whether it is worth living is whether you have enough of it.

Holmes's friend, William James, was greatly disappointed by his speech. James wrote to another friend that Oliver Wendell Holmes seemed "unable to make any other than that one set speech which comes out on every occasion. It was all right for once to celebrate more vital excitement, *joie de vivre*. But to make it systematic, oppose it to other duties, was to prevent it especially when one is a Chief Justice." To James, this was "childish." "Mere excitement was an immature ideal unworthy of the Supreme Court's official endorsement."

Yet to Holmes's friend, Morris Raphael Cohen, the philosopher, this childish quality enriched Holmes's personality. In his *Meaning of Human History*, Cohen refers to Holmes, along with Einstein and Socrates as men "who never [outgrew] a childish curiosity about the universe and continue, as long as they live, to ask questions of the world and to revise mistaken views."

A favorite Holmes story is revealing in this context. He told Whitney North Seymour in 1932, that as a boy, he was very much influenced by Ralph Waldo Emerson. When he was fifteen and preparing to read Plato, he asked Emerson, "Mr. Emerson, I'm about to read Plato. Have you any advice for me?" Emerson replied, "Yes, Oliver, I have. You pick him up in your hand and you look him in the eye, and you say 'Plato, you've been dead for 2,000 years and I'm alive today. *What have you got to say to me?*"

Throughout his life, Holmes stressed that "man is born a predestined idealist, for he is born to act." Life was action and "[t]o act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal. . . . Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. . . . It suggests that even while we think that we are egotists we are living to ends outside ourselves."

Replying by letter to a senior at Harvard, Oswald Ryan, whom he had met and who had expressed to him how much he had been stirred by Holmes's speeches, Holmes wrote:

> I am glad you got some good out of my speeches, and am obliged for your telling me so. Life is a romantic business. It is painting a picture, not doing a sum, but you have to make the romance, and it will come to the question how much fire you have in your belly. . . ."

Holmes had great personal charm. He was in appearance serene and confident. Holmes was also a man of humility and very much a skeptic. He was aware of his own limitations and certainly of the world around him and of the people inhabiting the earth.

This characteristic of Holmes has been highly criticized by the natural law philosophers and reminds me of the story of the Justices of the High Court who were addressing a petition to Queen Victoria on the opening of the Royal Courts of Justice in 1882. "We, your majesty's Judges, conscious as we are of our manifold defects," they

started, when Lord Bowen interrupted: "Aren't we being hypocritical to suggest that we are conscious of our shortcomings?" "Well how would you rephrase it," he was asked, and he replied, "It would be more appropriate to write: Conscious as we are of the manifold defects of each other."

Holmes's humility, in a sense, was also reflected in his scepticism and refusal to accept ultimates and absolutes, legal or philosophic. He did not believe in natural law, which he considered reflected a naive state of mind of those who did so believe. He accepted man's attempt to generalize what was good and true and beautiful, but these generalizations had no claim to the ultimate standards. When Wu, the young Chinese student who wrote frequent letters to Holmes, said that this is the best possible world, Holmes replied that this was a mere speculation *in vacua* on Wu's part. This was "[c]hurning the void to make cheese." He then confessed to Wu, "I do not know whether our ultimates such as good and bad, ideals, for the matter of that, consciousness, are cosmic ultimates or not. They seem to me to bear marks of the human and the finite." He then added that forms are useful only to present their contents, "just as the only use of a pint pot is to present the beer (or whatever lawful liquid it may contain) and infinite meditation upon the pot will never give you the beer." His own belief, he wrote to Wu, was that: "[W]e are in the universe, not it in us . . . Because the cosmos may produce intelligence out of the course of its energy, there is no reason to suppose that for me this marks any ultimate. I suspect that all my ultimates have the mark of the finite upon them, but as they are the best I know, I give them practical respect, love, etc., but inwardly doubt whether they have any importance except for us and as something that with or without reasons the universe has produced and therefore for the moment has sanctioned. . . ."

In a letter to Cohen, in 1917, when Cohen was a young teacher of philosophy, he repeated that: "[M]an cannot swallow the universe. I at least go on very comfortably without the belief that I am in on the ground

floor with God or that cosmos, whether it wears a beard or not, needs me in order to know itself." Then he added the awesome prophetic insight of such significance to us today:

> [B]ut I do not believe that a shudder would go through the sky if our whole ant heap were kerosened. But then it might—in short my only belief is that I know nothing about it. Truth may be cosmically ultimate for all I know. I merely surmise that our last word probably is not the last word, any more than that of horses or dogs. It is our last word nonetheless. And I don't see why we shouldn't do our job in the station in which we were born without waiting for an angel to assure us that it is the jobbest job in jobdom.

Holmes coined the word "jobbits." The "jobbest job in jobdom" meant doing your job in the grand manner and accepting its effect on you and society.

To Holmes, humanity and Holmes too, of course, were in the belly of the Cosmos and not the Cosmos in humanity and him. As the "Grand Panjandrum" he referred to as the deity had failed to disclose to him the plan of campaign, if indeed there was one, as a true soldier, he carried on.

Holmes was born on March 8, 1841 in Boston, Massachusetts, to Dr. Oliver Wendell Holmes and Amelia Lee Jackson Holmes. Dr. Holmes's poetry and prose contributed to the "Flowering of New England"; his scientific writing advanced American medicine. In 1861, Holmes received a Bachelor of Arts Degree from Harvard College. From 1861 to 1864 he served as a lieutenant and captain in the Civil War. He was wounded three times in battle and never forgot those wounds. They were memorable to him. In a letter to Harold Laski dated October 22, 1922, he wrote "Ball's Bluff, 61 years ago yesterday," referring to his first wound received in battle. He was mustered out as a captain, brevet colonel. Holmes frequently alluded to his war experiences and the mystique of dying for causes not fully understood.

In appearance, "as he grew older Holmes grew even

better looking" according to Dennis Brogan and "there remained to the end something preeminently military, something Gascon, in that mustache and that spare soldierly figure." His complexion was pink and white, and he featured a bristling white cavalry mustache. He was tall, erect, and had pleasing features. The War gave him a "Soldier's Faith," the title he gave to an address on Memorial Day in 1895, when he said:

> I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.

Holmes was graduated from Harvard Law School in 1866, admitted to the Massachusetts Bar in 1867, and began to practice law. From 1870-1871, he was an instructor in constitutional law at Harvard College and later lectured at the Law School and subsequently was appointed Professor of Law. From 1870-1873 he was the editor of the *American Law Review*, a leading legal journal of the period. Many of his contributions to this publication show the seeds of a style and thought that are found later in his Supreme Court opinions.

In 1872, he married Fanny Bowditch Dixwell. No children were born to this marriage. To some degree Holmes's law clerks were a substitute for a family. In 1873, his edition of Kent's *Commentaries* (12th) was published. Professor Thayer of the Harvard Law School originally invited Holmes to collaborate on this publication, but as Holmes did all the work, he took the credit, to Thayer's great annoyance. From 1873-1883, he was a partner in the Boston law firm of Shattuck, Holmes and Monroe.

Despite all this activity, Holmes led an isolated life.

Brandeis once reminisced that "when Holmes was a member of the law firm, he never met any of the clients of the firm." Holmes, however, justified this practice by noting that "only the thinnest veneer of civilization distinguishes man from brute."

In 1880, he became a lecturer on common law at the Lowell Institute, Boston. His lectures there eventually evolved into that magnificent scholarly analysis of our legal system, *The Common Law*, which was published in 1881. Professor Paul A. Freund notes that this work was quickly recognized in the United States as well as in England "as a seminal and important study, reflecting exceptional learning in the Germanic and medieval English sources and even more uncommon power and originality in arguing his organizing ideas." The opening statement on page one of *The Common Law* has achieved historic and scholarly importance:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. . . . The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

After a year at Harvard as Weld Professor of Law, Holmes resigned in 1883 to become an Associate Justice of the Massachusetts Supreme Judicial Court. In 1899 he was appointed Chief Justice of that Court, and on December 8, 1902, President Roosevelt appointed Holmes Associate Justice of the United States Supreme Court.

The Boston Bar gave Holmes a farewell dinner before he left for Washington to take his seat on the bench. As he left the banquet hall, someone attempted to compliment Holmes by calling out, "Now Justice will be ad-

ministered in Washington." To this Holmes is supposed to have replied, "Don't be too sure. I am going there to administer *the law*." There are a number of similar stories. Biddle refers to Charles P. Curtis' *Law As Large As Life*, in which Curtis relates that Justice Hand once teased Holmes after a walk they had had together. Holmes was leaving to attend a Supreme Court session and Justice Hand said, "Well, sir, goodbye. Do Justice!" Holmes replied sharply, "This is not my job. My job is to play the game according to the rules."

Charles Butler, who was a Reporter for the Supreme Court, told the story that just as Holmes went on the Bench to take the oath, he handed Butler a telegram to be sent to the Governor of Massachusetts, containing his resignation as Chief Justice of the Supreme Judicial Court of Massachusetts. Holmes obviously took no chances, perhaps because of the circumstances surrounding his appointment by Roosevelt.

When Holmes took his seat on the Supreme Court, the Court was 112 years old. Interestingly, between Chief Justice Marshall who was appointed in 1801 and Fuller, who was Chief Justice in 1902, there had been but three Chief Justices. President Theodore Roosevelt selected Holmes because he believed he would reflect the President's antitrust views on the Court. Although a conservative, Holmes was still prepared to test alternatives and was also a pragmatist. He had written in 1873 that "it is no sufficient condemnation of legislation that it favors one class at the expense of another, for much or all legislation does that; and nonetheless, when the *bona fide* object is the greatest good of the greatest number." The most that should be expected of legislative reform, he maintained, "is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum."

Theodore Roosevelt had reservations about Holmes. He was concerned that he was too ready to concede the

argument against his own interest. Why did he then appoint Holmes? It is interesting to note his reasons for they reflect the criteria our Presidents have applied in appointing Supreme Court justices. Lincoln, for example, appointed Chase Chief Justice because of public respect for Chase's abilities and because "we wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known." As have other Presidents, Lincoln looked for a man of integrity and legal ability, but, most importantly, he hoped to appoint a judge "who would be a correct and faithful expositor of the principles of his administration and policy after his administration shall have closed."

The desire to appoint Supreme Court Justices who will continue a President's policies long after the appointing President's term has expired can be seen in another historical incident. When Taft turned over the White House to Wilson in 1913, he held a news conference and he candidly admitted that he had told the judges he had appointed to the Supreme Court, "Damn you, if any of you die, I'll disown you. [2 H. Pringle, *The Life and Times of William Howard Taft* 854 (1939).] It is also interesting to note that Taft stayed on as Chief Justice, despite the debilitating effects of his age, because he was concerned about President Hoover's liberal tendencies. Taft felt he had to check these tendencies and "prevent the Bolsheviki from getting control."

Feeling similarly about Supreme Court appointments, Roosevelt asked Senator Lodge to find out whether Judge Holmes was in sympathy with the views of his administration. As a strong point in Holmes's favor, Roosevelt noted:

> [Holmes's labor decisions had] been criticized by some of the big railroad men and other members of large corporations. The ablest Lawyers and the greatest judges are men

> whose past has naturally brought them into close relationship with the wealthiest and most powerful clients, and I am glad when I can find a judge who has been able to preserve his aloofness of mind so as to keep his broad humanity of feeling and his sympathy for the class from which he has not drawn his clients. . . ."

Roosevelt contended that he was not seeking a judge for the Supreme Court who was "partisan" nor a "politician" in "the ordinary and low sense which we attach to the words," but he insisted that "in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a party man, a constructive statesman, constantly keeping in mind his adherence to the principles and policies under which this nation has been built up and in accordance with which it must go on. . . ."

Holmes was appointed and, as Roosevelt suspected, joined what Roosevelt considered a reactionary minority in the *Northern Securities* case, a decision the government won by a narrow margin. In his dissenting opinion, Holmes wrote that famous line: "Great cases like hard cases make bad law." His dissent continued: "For great cases are called great not by reason of their real importance in shaping the law of the future but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well-settled principles of law will bend." At first, Roosevelt barred Holmes from the White House, but he later relented.

Holmes was quite a charmer—apparently a highly attractive conversationalist. "His conversation and bearing," wrote Morris R. Cohen, "were like rare music that lingers in one's memory." He particularly preferred the company of attractive women who were also intelligent. Holmes came from the ruling caste of New England, and the conversation of his famous father and the atmosphere of his home were scientific and literary. The cultural dominance

of New England was at its height when Holmes grew up, and it was reflected often in his conversation. Although Holmes was loyal to the values of his cultural heritage, he could appreciate others. I suspect, too, that Holmes somewhat resented the fact that his father dominated the Boston scene during the first 50 years of Holmes's life. Andrew Lang, noted for his power as a conversationalist, once insolently said to Holmes on meeting him, " 'So you are the son of the celebrated Oliver Wendell Holmes.' 'No,' replied Holmes promptly, 'He was my father.' "

Holmes believed in a strong and healthy body. In order to get everything out of life, one had to be prepared not only mentally but physically as well. Francis Biddle tells the story that when he first reported to Holmes in 1911 to be his secretary, Holmes told him what he told all the other new secretaries: "My son, my philosophy is divided into two parts, each equally important. The first, keep your bowels open and the second, well the second is somewhat more complex and a part of your duties is to hear it during the next nine months."

Holmes thought that the process of actually living, functioning, and continuing life by eating, procreation, and rest could possibly be more important than striving for ideas and ultimates. "I wonder," he wrote to Pollock, "if cosmically an idea is any more important than the bowels." Biddle exclaims, "The bowels! No wonder Father Lucey called Holmes 'an animal man'—a designation which would have mightily pleased our Judge—and added that Holmes's concept of democracy embodied 'a strong jungle odor.' "

I would now like to comment on Holmes's legal style, his reading habits and the judicial philosophy reflected in his thinking as "The Great Dissenter." Holmes was not only a great wit, but according to Biddle, "[t]hings he said had the rare quality of tempered irony. His words were feathered arrows, that carried to the heart of the target from a mind that searched and saw." In addition to law, he read books on economics, philosophy, sociology, and belles-lettres. He read Hegel and Marx many times, not

because he was convinced of their worth, but because Hegel ("The Old Beast") had such "penetrating apercus," that Holmes wanted to be able to state articulately "why one doesn't believe them."

That "childish curiosity" of Holmes noted by Cohen, was really an intellectual curiosity. He dug deep intellectually, reading Aristotle, Marcus Aurelius, Spinoza, Tarde, James, Flaubert, Santayana, Dante, Fabre, Proust, and Anatole France. For lighter moments he enjoyed Sherlock Holmes and P. G. Wodehouse.

He corresponded with Sir Frederick Pollock for 50 years. Holmes also had dialogues with Professor Morris Raphael Cohen, Howard Laski, Felix Frankfurter, Lewis Einstein, and Dr. John C. H. Wu about the books he read and on many other matters, such as law, politics, philosophy, and personalities of the day. His letters are highly literate, but I suspect, although casual, still with a certain polish that would lead one to believe that he was writing for posterity.

Holmes had an irresistible urge for books, even those that he considered boring and that reflected views he objected to or criticized. He was concerned that by not reading them he would be missing something. He pursued these habits to his last days, studying, reading, looking for new light. One day, when Holmes was 90, a friend found him reading Plato. "Still studying at your age?" asked the friend. "I'm preparing for the final examination," explained Holmes. His letters were all written by hand, at home at his standup desk and often in court. He read the briefs of counsel in advance and analyzed them thoroughly. Hence, when they argued points he understood he would write his letters instead of concentrating on the argument. This gave him, he used to say, an undeserved reputation for attention and industry.

In the tradition of the English Bench, Justice Holmes reached his decision in most cases after hearing oral arguments. Objecting to extensions of the one hour oral argument rule of the Supreme Court, Holmes firmly believed that a properly organized and developed appellate

argument required no more than a half hour. Chief Justice Fuller appreciated Holmes's legal style and logic to such an extent that "whenever a new opinion by Holmes was brought to the Chief Justice, he would stop whatever he was doing and read it aloud with such exclamations as 'Isn't that marvelous?' 'Doesn't he write superbly?'. . . ."

Biddle noted in his Oliver Wendell Holmes Devise Lectures that "Holmes used to tell his secretaries that the only 'prime' authority was found first in his opinions in the Supreme Court of the United States; second, in his opinions on the Massachusetts Court; and, of much less importance, in the opinions of his brethren on the United States Court." If some other precedent had to be cited, a reference at most was enough. Quotations he considered to be padding.

Holmes wrote his opinions within a day or two after the oral argument. He was thoroughly familiar with the briefs of counsel and after analyzing them would immediately write and deliver his opinion. As a result, word spread, to the consternation of Holmes and his colleagues, that there was not sufficient review of the case on his part. He therefore changed his routine. He wrote the opinion just as quickly as before but did not deliver them until some months had gone by. This put a stop to those rumors and, as he later stated, allowed him to "acquire the reputation for mellow judgment and judicial restraint."

In this context, Holmes had little sympathy with judges reserving judgment after the oral argument. Writing to Pollock in 1909 he referred to the procedure of the Supreme Court that permitted petitions for rehearing and filing briefs:

> I think it an abuse. I suppose it comes from the habit in some states. Latterly I have escaped except in cases where a crank was sure to ask it if the case was decided against him. At first, a good many such applications were made in my cases—the fact that the decision was written at once being regarded as evidence of inadequate consideration. Such humbugs prevail! If a man keeps a case six months it

> is supposed to be decided on "great consideration." It seems to me that intensity is the only thing. A day's impact is better than a month of deal pull.

The language of the law is undeniably dull, as Mellinkoff notes, yet, lawyers can appreciate the sparkle, irony, and style that occasionally pop up in legal opinions and other legal literature. Holmes was such an exception. Cardozo, who was quite literate himself, was highly appreciative of Holmes's literary style.

> Law in the hands [of Holmes] has been philosophy, but it has been literature too. If anyone has ever been sceptical of the transfiguring power of style, let him look to these opinions. They will put scepticism to flight. How compact they are, a sentence where most of us would use a paragraph, a paragraph for a page. What a tang in their pointed phrases; what serenity in their placed depths; what a glow and a gleam when they become radiant with heat. One almost writhes in despair at the futility, too painfully apparent, of imitation or approach."

Holmes developed his style of writing comparatively early. During his days on the Massachusetts court, he wrote many gems. For example, when the mayor of a city was sued for dismissing a policeman because of his political views, Holmes remarked that the "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Holmes also wrote, "If it is a bad rule, that is no reason for making a bad exception to it." This one I love: "A boy who is dull at fifteen probably was dull at fourteen."

He had a distrust for maxims and generalities. Be wary he warned: "General maxims are oftener an excuse for the want of accurate analysis than a help in determining the extent of a duty or the construction of a statute."

> The greatest danger . . . is that of being misled by ready-made generalizations, and of thinking only in phrases to which as lawyers the judges have become accus-

> tomed, instead of looking straight at things and regarding the facts in all concreteness as a jury would do.
>
> General propositions do not decide concrete cases. The decisions will depend on a judgment or intention more subtle than any articulate major premise.

Writing to Wu, the young Chinese law student, Holmes objected to Wu's propensity for using long philosophical words. "The great thing," Holmes stressed, "is to have an eye for the essential. If a boy gets his fingers pinched between two inward revolving wheels, it probably will only distract attention and bore the reader to describe the machinery." Holmes commented to Frankfurter that many lawyers are prone to handing out generalities. "But the point that matters," he stressed, "is whether the boy got his finger pinched." Finally he wrote, "No generalization is wholly true—not even this one."

Note his irony and humor. Writing to Pollock with reference to a book by Vinogradoff, *Outlines of Historical Jurisprudence* (1920), which he had just read, Holmes commented: "I took another flying glimpse at your man Vinogradoff's new book. It gave me the impression of the Chinaman who ran three miles to jump over a hill—but I just looked, yawned and passed on." The following examples show the Holmesian style, his succinctness, epigramatic quality, and questioning skepticism.

> The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.

> For the rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

> [Wiretapping] is such dirty business.
>
> The 14th Amendment does not enact Mr. Herbert Spencer's Social Statistics.
>
> To rest upon a formula is a slumber that, prolonged, means death.
>
> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Professor Hart has noted that "Holmes was sometimes clearly wrong, but when this was so he was always wrong clearly."

Although Holmes was highly influential in developing constitutional law principles pertaining to business and commerce, he was basically an economic conservative. He was different in this respect from Brandeis who wanted to shape economic forces and to build a new economic world. He hated these cases because they usually were based on "lumpy facts," and Holmes hated facts. As Biddle has noted, "one of the many contradictions of [Holmes's] personality was his fastidious disrelish for facts as such, coupled with a corresponding distrust for generalities." In fact, he did not read newspapers, because they were full of information which bored him.

Writing to Pollock, Holmes complained: "I never know any facts about anything and always am gravelled when your countrymen ask some informal intelligent question about our institutions or the state of politics or anything else. My intellectual furniture consists of an assortment of general propositions which grow fewer and more general as I grow older."

But there was a great redeeming feature about Holmes's ignorance of economic principles. He did not let it affect his judicial review of legislation. He did not insist

on applying his own moral theories to others. Holmes once burst out to Curtis, "about 75 years ago, I learned that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say whether I like it or not, 'Goddamit, let 'em do it!' "

Mason gives another version in his book on Brandeis. One day a friend asked Holmes if he had ever worked out any general philosophy to guide him in the exercise of the judicial function. "Yes," he replied, "long ago I decided that I was not God. When a state came in here and wanted to build a slaughter house, I looked at the Constitution and I couldn't find anything in there that said a state couldn't build a slaughter house. I said to myself, if they want to build a slaughter house, God-dammit, let them build it!"

Even though he did not agree with the economic theories advanced by the legislation, and even doubted whether they could effectively be implemented, he still supported them. This was the liberal side of Holmes, one who believed in the free exchange of ideas in the market place. What saved him was that unlike others, he recognized his own ignorance. True, he preferred ideas to facts, but he was able to look at himself objectively and recognize his weakness.

Writing to Pollock he told the following story, which is quite illustrative:

> Brandeis the other day drove a harpoon into my midriff with reference to my summer occupation. He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is. I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn. Of course a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance

> of my duties, but I shrink from the bore—or rather I hate to give up the chance to read this and that, that a gentleman should have read before he dies. I don't remember that I ever read Machiavelli's *Prince*—and I think of the Day of Judgment. There are a good many worse ignorances than that, that ought to be closed up.

Holmes did try to read the *Report on the Strike of Textile Workers in Lawrence* that summer, but he gave up. In his letter to Pollock, dated June 27, 1919, he explained his failure by relating the story of the "Catholic lady who on a fast day called for bass, then terrapin—not forthcoming—and then said, 'Bring me a mutton chop. God knows I have tried for fish.' If I am destined to lapse from facts back into ideas, God knows I have tried for the facts."

Because he did believe in judicial restraint and was quite sophisticated as to his own ignorance, Holmes retained his judicial objectivity, to the extent that he voted to uphold legislation of which he disapproved. He expressed his philosophy in this context in a letter to Pollock in 1910.

> Of course I enforce whatever Constitutional laws Congress or anybody else sees fit to pass—and do it in good faith to the best of my ability—but I don't disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence, and my disbelief that the Interstate Commerce Commission is a fit body to be entrusted with rate-making, even in the qualified way in which it is entrusted. The Commission naturally is always trying to extend its power and I have written some decisions limiting it (by construction of statutes only). However I am so sceptical as to our knowledge about the goodness or badness of laws that I have no practical criterion except what the crowd wants. Personally I bet that the crowd if it knew more wouldn't want what it does—but that is immaterial.

This appears to have been the touchstone of Holmes's judicial philosophy.

I would very much like to discuss Holmes—The Dissenter. Actually, he did not dissent in so many cases. He joined in thousands of majority opinions and during his 30 years on the Supreme Court; yet only 175 of his opinions were dissenting. Broughton notes, "In only one of those did he stand alone; all others were in concert with one or more of his conferees. During this period, in the 5,950 cases in which individual opinions were delivered, there was a total of 1,806 minority opinions, an average of 201 per Justice. Thus, Holmes in fact dissented 13% less often than that of his brother Justices."

What is significant is the effectiveness of his dissents and how they influenced the development of American Constitutional law. But that is another story time does not permit at present.

Thus, we have the paradox of Mr. Justice Holmes, a sceptical conservative with little or no interest in social reform, yet so influential in its metamorphosis. He felt that Supreme Court Justices should not write their own economic notions into the Constitution or interfere with social experimentation.

His disciple, Mr. Justice Frankfurter, summed this up well when he wrote:

> [Holmes] scrupulously treated the Constitution as a broad charter of powers for the internal clashes of society, and did not construe it as though it were a code which prescribed in detail answers for the social problems of all times. Thus, the enduring contribution of Mr. Justice Holmes to American history is his constitutional philosophy. He gave it momentum by the magic with which he expressed it.

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